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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Railroad cars connect by coupling devices, which consist of a knuckle attached to a drawbar at each end of every railroad car. Drawbars are designed to couple automatically if properly aligned. The Safety Appliance Act, 45 U.S.C. §2, makes it unlawful for railroads to use cars which cannot be coupled and uncoupled automatically without the necessity of men going between the cars to perform the coupling. The law does not specifically address the aligning or centering of a drawbar preparatory to coupling. Drawbars, by design, move from side to side to allow movement of cars around curves. This movement frequently results in the drawbar being off-center, thereby preventing a coupling with another car until the drawbar is centered. Although some state and federal courts have held that the realignment of drawbars is a *per se* violation of the Safety Appliance Act, other courts, including the Fifth and Third Circuits, have held that the Safety Appliance Act is not automatically violated by this everyday railroad operation. The question presented is:

Does Section 2 of the Safety Appliance Act impose absolute liability on a railroad whenever a worker aligns a non-defective drawbar before a coupling takes place?

STATEMENT REQUIRED BY RULE 29.1

Frank J. Eschberger is the respondent/plaintiff.

The petitioner/defendant Consolidated Rail Corporation has the following subsidiaries and affiliates:

CRR Industries, Inc.

CRC Properties, Inc.

Akron & Barberton Belt RR. Co.

Pitts., Chart. & Yough. Rwy. Co.

Indiana Harbor Belt RR. Co.

Albany Port Railroad Corp.

Railroad Assoc. Insurance, Ltd.

Calumet Western Railway Co.

Lakefront Dock & RR. Term. Co.

Transportation Data Xchge., Inc.

Merchants Desp. Trans. Corp.

Mich. Fay., & Greenb. RR. Co.

Trailer Train Co.

Monongahela Railway Co.

Peoria & Pekin Union Rwy. Co.

Calpro Company

St. Lawrence & Adiron Rwy. Co.

Peoria Midwest Transp. Corp.

Railbox Company

Belt Railway Co. of Chicago

Penn Central Communications Co.

Railgon Company

Chicago & Western Indiana Rwy. Co.

CRR Credit Corp.

CRR Investments, Inc.

PD Land Services, Inc.

CG Products, Inc.

Conrail Mercury, Inc.

Concord Resources Group, Inc.

CG Lockport

CU Energy Partnership LP

General American Insurance Co.

Concord Canada, Inc.

Land Acquisition Services, Inc.

CR Quality Services, Inc.

Soretox, Inc.

NY Land Acquisition Services, Inc.

Stablex Canada, Inc.

Stablex Filtration, Inc.

Black Hawk Development, Inc.

Incinerator Proj. Joint Venture

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

PETITION FOR WRIT OF CERTIORARI

Petitioner Consolidated Rail Corporation respectfully prays that a writ of certiorari issue to review the order and opinion of the New York Supreme Court, Appellate Division, Fourth Judicial Department, entered in this case on June 7, 1991.

OPINIONS BELOW

The opinion of the Appellate Division of the New York Supreme Court is reported at _____ A.D.2d _____, 572 N.Y.S.2d 539 (4th Dept. 1991) and is reprinted in the Appendix to this petition at 3a.

JURISDICTIONAL STATEMENT

The opinion and order of the Appellate Division was entered on June 7, 1991. The Appellate Division denied a motion for reargument or permission to appeal to the New York Court of Appeals on October 4, 1991 (A. 6a). A motion for permission to appeal to the Court of Appeals was made to the New York Court of Appeals and was denied on December 23, 1991 (A. 8a). Thus, the Appellate Division's decision was rendered by the highest court of the state in which review could be had and the jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257.

STATUTORY PROVISIONS INVOLVED

This action was brought pursuant to the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.*, but involves the interpretation and application of the Safety Appliance Act ("SAA"), 45 U.S.C. §2 (1991) which provides:

> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

STATEMENT OF THE CASE

On August 6, 1983, Respondent was working as a railroad trainsman at one of Conrail's switching, or classification, yards in Buffalo, New York, one of more than 4,000 such yards in the United States,[1] where incoming freight cars are sorted and combined into outgoing trains. In order to combine the trains, cars are directed down specific tracks to be coupled to other cars on those tracks. This process typically requires the cars, while uncoupled at one or both ends, to travel to some extent over curved track. One of Respondent's regular jobs, which he had done "thousands of times", was to manually center the automatic coupling equipment located at the end of railroad freight cars. The standard coupler consists of a "knuckle" attached to a "drawbar." (See A. 18a; [photographs]). The drawbar is that part of the coupling device that is attached to the car which allows the coupler to move laterally so that the train can negotiate the curve of the track. If the drawbar were fixed and not capable of side to side movement, trains could travel only in straight lines. The knuckle is at the end of the drawbar and in order to couple two freight cars together, the drawbars must be aligned and at least one of the two knuckles must be open.

Conrail employees are required to follow a Conrail safety rule, in effect when Respondent was injured, specifying the procedures to be followed before an employee aligns a drawbar. This rule provides that, before an employee goes between standing (non-moving) cars, the cars must be separated by at least thirty feet and the track must be "protected," namely, shut down so that there is no movement of cars on the track while the employee is centering the drawbar (A. 40a).

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[1] 48 Fed. Reg. 45272.

The Conrail Safety Rule provides the same procedure mandated by the agency responsible for administering the Safety Appliance Act, the Federal Railroad Administration ("FRA")[2] which adopted a similar rule in 1984 applicable to all railroads. 49 C.F.R. Part 218. The FRA Rule was proposed jointly by the American Association of Railroads and the United Transportation Union, the union which represents the trainmen who couple railroad cars. The rule anticipates that trainmen, in the normal course of their operations, will go between cars which are not moving and are on protected tracks to manually adjust drawbars. 48 Fed. Reg. 45272-74 (October 4, 1983) (A. 19a).

Respondent sued Conrail in the New York Supreme Court, Erie County, under the Federal Employers Liability Act ("FELA"), 45 U.S.C. §51 alleging negligence and a violation of Section 2 of the SAA.[3] He testified at trial that he followed the Conrail Safety Rule by separating the cars by more than thirty feet and by calling the tower to shut down the track. Then, with the car stationary and separated by more than thirty feet from any other railroad car,[4] on a track protected against any car movement, he manually moved the drawbar to the center position, following which he directed his engineer to push the cars together and an automatic coupling was made. He testified that he injured his back in the course

[2] The FRA is an administration in the Department of Transportation. The Administration carries out all railroad safety laws in the United States. 49 U.S.C. §103(a).

[3] Although the SAA itself provides only for enforcement of Section 2 by civil penalty actions (45 U.S.C. §16), the FELA has been construed as providing a cause of action without negligence, based on a violation of the SAA. *E.g., Crane v. Cedar Rapids & I.C.R.R.*, 395 U.S. 164, 166 (1969); *see Urie v. Thompson*, 337 U.S. 163, 188-89 (1949).

[4] In fact, Respondent testified that the car on which he was aligning the drawbar was separated from any other equipment on either side by at least fifty feet.

of moving the drawbar. Other than moving the drawbar, Respondent had no contact with a railroad car. In other words, he was injured because he moved the drawbar, not because he was between cars.

Respondent also testified that there was no defect in the equipment and that he reported no defect, as he would have been required to do under Conrail's safety rules. Additionally, at trial, he called two railroad witnesses to describe the movement of cars around curves in the Frontier Yard, and the fact that this movement causes the drawbar to hang more towards the outside of the curve, thus affecting the alignment of the coupler and its ability to couple with another car.

At the close of proof the trial court ruled that Respondent had not introduced evidence of any negligence on the part of Conrail and dismissed his FELA negligence claim. However, the trial court denied Conrail's motion made at the close of Respondent's case to dismiss his cause of action under the Safety Appliance Act.[5] Further, despite requests by Conrail for such an

[5] THE COURT: There's one matter that's been pending before the Court, and that is the motion by the Defendant made at the close of Plaintiff's case to dismiss the cause of action as pled under the Safety Appliance Act, and I reserved decision. I—we had marked Defendant's Exhibit M, which was the memorandum of law in support of that motion, and we heard—we heard extensive argument in that regard. I've carefully reviewed my notes relative to the—to the oral argument. I also have reviewed the Defendant's memo, and particularly studied over the case which the Defendant's memo, and particularly studied over the case which the Defendants urged on the Court, which is Maldonado, M-a-l-d-o-n-a-d-o, versus Missouri Pacific Railway Company, it's 798 Federal Reporter 2d 764, and it's a case out of the United States Court of Appeals for the Fifth Circuit. I have—I relied upon that case, and I have also read the Plaintiff's case offered in response, which is Schaaf, S-c-h-a-a-f, versus Chesapeake and Ohio Railroad Company. Interestingly enough, referred to in Maldonado. And that's—the cite I have is 37 Northwest—I'm sorry, 317 Northwest 2nd 679, and that's out of the Court of Appeals of Michigan. And concluding my research, the Defendant's motion is in all respects denied R. 2409-10.

instruction, the trial court refused to instruct the jury in accordance with *Maldonado v. Missouri Pac. Ry. Co.*, 798 F.2d 764, 768 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987), that the mere fact that the railroad aligned a non-defective drawbar, in and of itself, does not establish a violation of the SAA.[6] The jury returned a verdict for Respondent of $5,437,000.

On Conrail's appeal, the New York Supreme Court, Appellate Division, Fourth Department, affirmed the judgment of liability,[7] and sustained the trial court's refusal to dismiss the cause of action based on the Safety

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[6] THE COURT: Now [Defendant's Request to Charge] twenty-eight, if the Court does not dismiss the Safety Appliance Act, and I did not, so the following instructions are requested.

(a) If the coupler on the railroad lumber car failed to couple automatically at any time because it was not properly set or aligned for coupling, such failure is not a violation of the Safety Appliance Act, and

(b) The mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. If you find that the drawbar was out of line by reason of the car having come around a curve or that it was otherwise not defective, it must be found that it was properly set so that it could couple. If it was not adjusted and aligned as automatic couplers must be in order to function properly, the failure to automatically couple at any point in the prior movement of the car would not be a violation of the Safety Appliance Act.

I—I gather—I gather, Mr. Griffin, that that—what you're requesting is basically in keeping with your motion and the Maldonado versus Missouri Pacific Railroad case. Is that substantially correct?

MR. GRIFFIN: That's true, Your Honor.

. . .

THE COURT: I'm going to decline to charge as requested in twenty-eight. R. 2488-2497.

[7] The Appellate Division reduced the verdict to $3,005,000 (A. 3a-5a).

Appliance Act and its rejection of a charge based on *Maldonado*. The Court recognized that there was a split in decisions on the point, but followed a line of cases[8] described as holding "that the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability upon the railroad," regardless of whether there is a defect in the equipment (A. 3a).[9] Conrail moved for reargument, citing, *inter alia*, the intervening Third Circuit decision in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128, 131 (3d Cir. 1991), which noted the same split in decisions and further observed that the issue had not yet been "definitely resolved by the Supreme Court," but adopted the *Maldonado* conclusion that the SAA is not violated by the alignment of a non-defective drawbar. The Appellate Division, Fourth Department, denied reargument and leave to appeal to the New York Court of Appeals (A. 6a); the New York Court of Appeals also denied Conrail's motion for permission to appeal (A. 8a).

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[8] *Metcalfe v. Atchison, T. & S.F. Ry.*, 491 F.2d 892 (10th Cir. 1974); *Leveck v. Consolidated Rail Corp.*, 148 Ill. App.3d 118, 498 N.E.2d 529 (1986); *Plouffe v. Burlington N.*, 224 Mont. 467, 730 P.2d 1148 (1986).

[9] In dicta, the court observed that Conrail had not met its burden of proving that the misalignment of the drawbar was not the result of an equipment defect (A. 4a). However, this gratuitous observation overlooked Respondent's own testimony and the testimony of Respondent's witness (*see* p. 7, *supra*).

REASONS FOR ISSUING THE WRIT

Preliminary Statement

The decision of the New York Appellate Division widens the split of authorities on this issue of substantial importance to Conrail and railroads nationwide. It is directly contrary to the Court of Appeals decisions in *Reed, supra*, and *Maldonado, supra; c.f. United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983). The decision has the effect of subjecting a railroad to liability for violating the Safety Appliance Act every time one of its employees aligns a non-defective, standard drawbar, a job performed countless times daily in railroad yards across the country. As the *Reed* court recognized, there is "no device [that] has yet been put into wide-spread use that would automatically align the drawbar." 939 F.2d at 130. Thus, the decision imposes unwarranted liability on railroads where there is no defect in their equipment. A writ of certiorari should be granted in order to clarify the present state of the law with regard to the Federal Safety Appliance Act.

THE APPELLATE DIVISION'S DECISION IS CONTRARY TO *REED, MALDONADO; C.F., LEWIS* AND IMPOSES UNWARRANTED LIABILITY ON RAILROADS WHERE THERE IS NO DEFECT IN THEIR EQUIPMENT.

Congress enacted Section 2 of the SAA in 1893 to remedy many injuries resulting from the use of the link and pin coupler equipment which required that a brakeman stand between moving cars and direct the link of one coupler into the mouth of the other coupler while the cars were moving together.[10] Section 2 of the statute prohibits railroads from using cars "not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of cars." 45 U.S.C. §2. The legislative history reveals that this provision was designed to address the hazardous situation described as follows:

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way . . . This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893).

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[10] H.R. Rep. No. 1678, 52nd Cong., 1st Sess. §3 (1892); S. Rep. No. 1049, 52nd Cong., 1st Sess. 75 (1892).

Thus, Section 2 of the Safety Appliance Act governs the dangerous *act of actually coupling* the cars, *not* the *preparation* for coupling the cars. Specifically, the statute does not prohibit men from going between cars which are standing still in order to prepare the knuckles and drawbars for couplings, as was the situation in this case.

> I think very few people have lost their lives by coupling inventions between cars when they are at a standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367.

This Court has long recognized that non-defective, perfectly operating automated couplers may not couple unless certain steps are taken to position the equipment in advance of coupling. In *Affolder v. New York, Chicago & St. Louis Railroad Co.*, 339 U.S. 96, 99 (1950), this Court concluded that under the SAA a coupler was defective if it failed to couple after it "was placed in a position to operate on impact." The *Affolder* Court, therefore, concluded that liability under the SAA depended upon "whether, after the couplers were placed in open or proper position, they failed to couple automatically on impact." *Id.*

In the instant case, Respondent was placing the drawbar, in the words of *Affolder*, in "proper position" to facilitate the very purpose of the Act—automatic coupling.[11] Although this Court recognized in *Affolder*

[11] Just prior to the *Affolder* holding, this court in *Carter v. Atlanta & St. Andrews Bay Ry. Co.*, 338 U.S. 430, 434 (1949), held that a defective coupler was one which failed to couple "*if the coupler was properly set* and failed to couple on the occasion in question." (Emphasis added). Similarly, the Sixth Circuit has held that it "was

(Footnote continued on following page.)

that the railroad could assert the defense that both knuckles were closed, whether there is a "misaligned drawbar" defense is an issue that has divided the federal and state courts since *Affolder,* and is presented here. One line of cases, consisting primarily of state court decisions, has given Section 2 of the SAA a broad, operations-oriented interpretation to maximize railroad liability for workers injured in connection with any efforts to align a drawbar.[12] Cases in this line have extended liability "even though the plaintiff's injuries were not caused by the coming together of the cars but simply by the strain of aligning the coupler." *Clark v. Kentucky and Ind. Terminal R.R.,* 728 F.2d 307, 312 (6th Cir. 1984).

The other line of cases, exemplified by recent federal appellate decisions, has recognized a "misaligned drawbar" defense. *E.g., Maldonado,* 798 F.2d at 767; *Reed,* 939 F.2d at 132. Both decisions build on the careful analysis of the history and purpose of Section 2 set forth in *United Transp. Union v. Lewis, supra* which sustained the FRA's interpretation of Section 2 as not prohibiting the use of couplers that required a worker to place an arm between the cars. In *Lewis,* 711 F.2d at 245, the District of Columbia Circuit noted the "practical consequences" of a contrary

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(Footnote continued from preceding page.)

an accurate statement of law" to charge a jury in a SAA case "that if they found that the couplers failed to couple automatically because they were not properly set that such a failure would not be a violation of the Act." *Cobb v. Union Ry.,* 318 F.2d 33, 37 (6th Cir. 1963), *cert. denied,* 375 U.S. 945.

[12] See *e.g., Schaaf v. Chesapeake & Ohio Ry.,* 113 Mich. App. 544 (Mich. Ct. App. 1982); *cert. denied,* 464 (U.S. 848 (1983); *Leveck v. Consolidated Rail Corp., supra; Plouffe v. Burlington Northern, supra.*

interpretation: "if the statute is read as a blanket prohibition against going between cars during coupling operations, it would make licit coupling an impossibility." After close review of the statute and its history the D.C. Circuit concluded that Section 2 addressed equipment, and "does not address operating procedures." *Id.* at 245 n.31.

Lewis concerned decisions of the FRA permitting use of "out hooks" to open the knuckles when cars are uncoupled, a task requiring the worker to put his arm between the cars. *Id.* at 236-237. As noted, the court sustained the FRA's interpretation of Section 2 as not resulting in a violation any time a worker had to put part of his body between two cars.

Shortly after *Lewis* was decided, the FRA adopted a rule, similar to the one Conrail had previously adopted, specifying the procedures to be followed to avoid unanticipated movement of cars when a railroad yard employee places himself between cars "to adjust a coupling device,"[13] an interpretation of Section 2 that does not view the existence of a misaligned drawbar as a *per se* violation.

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[13] 49 C.F.R. Part 218.30. The FRA rule requires each railroad to have a rule, like Conrail's Rule, requiring that both cars be stopped (and under Conrail's rule at least 30 feet apart) before the worker goes between the cars. The rule applies only to "hump" yards, like the one where Respondent worked, where incoming cars are separated at a slight hump in the track and then move by gravity, controlled by speed retarders and switches, to the appropriate track where the outgoing train is being made up. *See* 49 F.R. 6495 (1984) (A. 30a). As the FRA explained when it proposed the rule, it would apply when workers had to go between cars when "adjusting coupling devices," including "adjusting drawbars." 48 F.R. 45272, 45273 (1983) (A. 19a, 24a).

In *Lewis* the D.C. Circuit had no need to determine the implications of its affirmance of the FRA's equipment-oriented reading of Section 2 on the misaligned drawbar defense issue.[14]

In *Maldonado, supra,* dealing with issues factually similar to the case at bar, the Fifth Circuit directly addressed the issue as to whether a misaligned drawbar is a *per se* violation of the SAA. After analyzing *Lewis* and this Court's decision in *Affolder,* the Fifth Circuit set forth a proper interpretation of the Safety Appliance Act when it stated "that drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the non-coupling does not reflect defective or failed equipment." *Id.* at 768.[15]

Recently, the United States Court of Appeals for the Third Circuit in *Reed,* after carefully reviewing *Affolder, Lewis, Maldonado,* and the conflicting case law, held:

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[14] Although the question was not before it in that case, the court stated its understanding that, under the caselaw to that point, actual failure to couple because of a misaligned drawbar or a closed coupler was sufficient to satisfy section 2 (*Lewis,* 711 F.2d at 251 n.39), a view that is contrary to *Affolder.* However, earlier in the opinion the court observed:

> That the knuckle on the coupler closes or that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is 'defective.' To be effective the coupling apparatus must permit limited lateral movement of the drawbar in order to allow the cars, when coupled together, to pass around curves without derailment and to allow coupling on a curve. Occasionally, drawbars move so far out of alignment as to preclude automatic coupling. It then becomes necessary to adjust the drawbar or the coupling knuckle, and this may require going between the cars. *Metcalfe v. Atchison, Topeka & Sante Fe Ry.,* 491 F.2d 892, 896 (10th Cir. 1974). After 90 years automatic ***realigning*** devices, as opposed to automatic ***coupling*** devices, are still in the experimental stage and have been installed on less than one percent of railroad cars. *Id.* at 896 n.2 (emphasis supplied). *Lewis,* 711 F.2d at 235 n.5.

[15] In that case, however, there was no evidence of the cause of the misalignment and so the trial court was upheld. *Id.* at 768.

carefully reviewing *Affolder*, *Lewis*, *Maldonado*, and the conflicting case law, held:

> We think the rationale of *Affolder*, which allows a defense of closed knuckles, applies equally to a situation where non-defective equipment is misaligned. In both instances, the causative factor which prevents the coupling may result from jarring or vibration of the car while moving, or from human error in failing to open the knuckle or align the drawbar. In these situations, the failure to couple might not be caused by defective equipment and consequently is not a violation of the Safety Appliance Act.

Reed, 939 F.2d at 132. The *Reed* Court further held that "the defendant must present evidence to show that the misalignment did not occur because of equipment failure" and concluded:

> We therefore reject plaintiff's contention that the mere failure to couple establishes a *per se* violation of the Safety Appliance Act and forecloses a defense by the railroad.

Id. at 132.[16]

[16] As stated above, there is dicta in the Appellate Division's memorandum decision in this case that, in any event, "Defendant failed to meet its burden of proving that the misalignment of the drawbar was not the result of an equipment defect." (A. 4a). Moreover, the only evidence of the cause of the misalignment was that the car went around a curve and Respondent unequivocally stated that the equipment was not defective. As noted, he called witnesses who testified as to the effect of the curve in the Frontier Yard on drawbar alignment. Petitioner was entitled to rely on this other evidence and had no affirmative obligation to present other witnesses or evidence on this point. This was an issue which should have been left to the jury, but the trial court refused to charge the jury in accordance with *Maldonado*. Similarly, in *Reed*, the defendant introduced no evidence of the cause of the failure to couple but instead relied on the plaintiff's proof on that issue. Despite the lack of affirmative proof by the defendant in *Reed*, the proof adduced by *Reed* led the court to determine that the SAA had not been violated. Thus, Conrail was entitled in this case to a jury instruction based on the "Maldonado defense."

The Appellate Division's holding in this case that "the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability upon the railroad" is directly contrary to *Reed* and other recent federal court decisions on this recurring issue of federal law, and those are the better-reasoned decisions, based as they are on an interpretation of the statute that is well-grounded in its language, history, and administrative interpretation.

THIS CASE PRESENTS A SERIOUS ISSUE REGARDING THE OPERATIONS OF RAILROADS ACROSS THE COUNTRY WHICH REQUIRES THIS COURT'S GUIDANCE.

In *Lewis,* 711 F.2d at 245, the District of Columbia Circuit Court of Appeals recognized the dramatic impact of a ruling which would create a *per se* violation of the Safety Appliance Act whenever a trainman went between cars as a part of the coupling procedure:

> If the statute is read as a blanket prohibition against going between cars during coupling operations, it would make licit coupling an impossibility. In the last step of the coupling process, men must go between the rails to couple hoses for the air brakes. Appellants' construction would effectively prohibit the performance of this everyday operation because generally it cannot be accomplished from outside the **rails**, much less from outside the cars. Congress could not possibly have intended such a result, as it was the 1893 Act itself which initiated the requirement that cars be equipped with air brakes. *See* 27 Stat. 531 (1893), codified at 45 U.S.C. §9; *United States v. Chesapeake & Ohio Ry.*, 247 F. 49, 50-51 (4th Cir. 1917) (Emphasis supplied) (footnotes omitted).

As the *Lewis* court concluded, "nothing in the plain language [of the Safety Appliance Act] suggests an intent to impose an independent prohibition against procedures that require men to go between cars." *Id.* at 243. Indeed, in addition to coupling railroad operations, such as operating handbrakes, replacing airhose gaskets and turning anglecocks can only be done from between the ends of railroad cars.

Thus, the *Lewis* court recognized that there is no absolute prohibition against railroad workers going in between cars during the coupling process. Yet, under the

rationale of the decision below and its forebears, the critical fact establishing liability is that, to adjust a coupler, the worker had to place a part of his body in the airspace between two cars to some extent. That is dispositive even though, as here, the couplers were not defective, the cars were immobilized fifty feet apart, and the injury has nothing to do with the fact that part of his body entered that airspace or even that there was a second car nearby.

As was stated above, the FRA has, by adopting regulations which specifically govern the act of aligning drawbars on standing, separated cars, given its implicit approval of the type of work being performed by Respondent in this case. Yet, the decision of the Appellate Division has the effect of penalizing Conrail for performing procedures consistent with the FRA Rule and which have been sanctioned under *Maldonado* and *Reed*.[17] Further, the substantial, adverse impact of this decision, both on Conrail and on railroads nationwide, is completely inconsistent with Congressional intent in 1893 in enacting the Safety Appliance Act.

Because this case squarely presents a conflict among the courts (both federal and state) on a recurring and important issue of federal law, the Court should grant this petition. Not only is there an existing circuit split on the proper interpretation of the Safety Appliance Act, but there is also a split between state and federal authorities. The impact of the resulting confusion and uncertainty on the railroad industry is significant.

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[17] In fact, the FRA imposes civil penalties for failing to comply with its operating rule. 49 C.F.R. Part 218.41; yet, the Appellate Division's decision has the effect of penalizing the railroad for the very conduct that the rule contemplates.

Conrail currently operates on a system-wide basis in 14 states, the District of Columbia, and one province in Canada, with approximately 26,000 employees, 5,292 of which are trainmen whose duties include the coupling of railroad cars. In New York, Conrail has fifteen major yards and many smaller ones where cars are coupled on a regular basis; it has well over a hundred such yards in other states. Thus, the decision below, coupled with the recent Courts of Appeals' decisions, has a significant impact on Conrail's operations by subjecting it to conflicting standards of liability for events which occur countless times every day in its many yards.

CONCLUSION

This case presents an important issue of federal law which has not been, but should be, settled by this Court. The Court should grant this petition in order to resolve the conflict in the courts regarding the meaning of Section 2 of the SAA and to provide the railroads and lower courts, once and for all, with a definitive ruling on the applicability of the Act to the railroad's daily operations. As the Court in *Reed* stated:

> In short, *Affolder* put the closed knuckles controversy to rest, but the other common cause of failed coupling, drawbar misalignment, has not been definitively resolved by the Supreme Court. Perhaps not surprisingly, the Court of Appeals and various state courts have differed in their approach to this question.

939 F.2d. at 131.

Petitioner respectfully submits that now is the time for this Court to definitively resolve this question.

Respectfully submitted,

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Attorneys for Petitioner
Consolidated Rail Corporation

March 3, 1992

APPENDIX

Order Modifying Judgment Entered June 7, 1991

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

PRESENT: CALLAHAN, *J.P.*, DOERR, BOOMER, GREEN, BALIO, *JJ.*

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

The above named Consolidated Rail Corporation having appealed to this court from the judgment of the Supreme Court, entered in the Erie County Clerk's Office on June 27, 1990, and said appeal having been argued by Richard Griffin of counsel for appellant, Paul Beltz of counsel for respondent, and submitted by Charles Clarke for the Association of American Railroads, Amicus Curiae, and due deliberation having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously reversed on the law and facts without costs and a new trial is granted on the issue of damages only unless

plaintiff, within 20 days of service of a copy of the order herein with notice of entry, stipulates to reduce the verdict to $3,005,000, in which event the judgment is modified accordingly and as modified affirmed without costs. All findings of fact made by the trial justice which are inconsistent with the Memorandum herein are hereby reversed and new findings are made, pursuant to CPLR 5712(c) as contained in the Memorandum which is hereby made a part hereof.

Entered: June 7, 1991 CARL M. DARNALL, Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court of the City of Rochester, New York, this JUN 7 1991.*

(SEAL) CARL M. DARNALL
Clerk.

Memorandum Decision Entered
June 7, 1991

349. (Erie Co.)—FRANK ESCHBERGER, RESPONDENT, V CONSOLIDATED RAIL CORPORATION, APPELLANT.—Judgment unanimously reversed on the law and facts without costs and new trial granted on the issue of damages only unless plaintiff, within 20 days of service of a copy of the order herein with notice of entry, stipulates to reduce the verdict to $3,005,000, in which event the judgment is modified accordingly and as modified affirmed without costs. Memorandum: Plaintiff, a brakeman, injured his back while he was manually adjusting a misaligned drawbar on a railroad car at defendant's Frontier Yard. Plaintiff commenced this action seeking damages for personal injuries, alleging causes of action under the Federal Employees Liability Act (FELA, 45 USC §51 *et seq.*) and the Federal Safety Appliance Act (FSAA, 45 USC §2). Plaintiff's FELA claim was dismissed at the close of the proof. The jury awarded plaintiff damages under FSAA in the principal amount of $5,437,000.

On appeal, defendant argues that it is not liable under FSAA for plaintiff's injury, which was caused by his manual manipulation of a misaligned drawbar. We disagree. Most courts which have interpreted FSAA have concluded that the failure of railroad cars to couple automatically because the drawbars were misaligned imposes absolute liability upon the railroad (*see,* Metcalfe v Atchison, Topeka & Santa Fe Railway, 491 F2d 892, 896 [10th Cir 1974] and cases cited therein). In similar situations in which railroad workers suffered injuries while adjusting a misaligned drawbar, most courts have found liability, and we reach the same result here (*see,* Leveck v Consolidated Rail Corp., 148 Ill App 3d 118,

appeal denied 113 Ill 2d 576; Plouffe v Burlington Northern, 224 Mont 467). Even if we were to recognize a misalignment defense to FSAA, as urged by defendant, we conclude that defendant failed to meet its burden of proving that the misalignment of the drawbar was not the result of an equipment defect (*see,* Maldonado v Missouri Pacific Railway Co., 798 F2d 764, 770, *cert denied* 480 US 932).

Evidence concerning improper practices at defendant's yard was relevant to plaintiff's negligence claims under FELA and properly admitted. The court's instruction on the aggravation of a latent condition tracked PJI 2:283 and adequately defined that concept to the jury. We find no error in the court's determination to allow defendant to prove at a posttrial hearing the amount of setoff it might be entitled to for payment of plaintiff's medical expenses. The issue of setoff is one for the court, not the jury (*see,* CPLR 4545 [c]; McLaughlin, Supp Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 4545, 1991 Supp. at 500). We further conclude that, by failing to object to comments made on summation by plaintiff's counsel at a time when the court might have taken corrective action, defendant has failed to preserve any issue concerning the propriety of the comments for review (*see,* Van Valkenburgh v Koehler, 164 AD2d 971). Moreover, were we to review the issue, we would hold that, although some of his remarks on summation were improper, the conduct of plaintiff's counsel was not so egregious as to require reversal.

Upon our review of the record, we conclude that the verdict is excessive, in that it deviates materially from what would be reasonable compensation (CPLR 5501 [c]). The highest amount that can be justified by plaintiff's

evidence is $853,000 for lost wages. We decline to disturb the amounts awarded for past and future medical expenses totaling $452,000. However, the jury's award of $4,000,000 for past and future pain and suffering cannot be sustained. Plaintiff has undergone two painful and serious surgical procedures on his back and faces the probability of further surgery. However, plaintiff is still able to walk, drive, and engage, in a limited fashion, in many of the activities he enjoys. In our view, the sum of $1,700,000 is the highest amount that can be justified as compensation for plaintiff's past and future pain and suffering. We, therefore, order a new trial on the issue of damages only, unless plaintiff stipulates to reduce the verdict to the principal amount of $3,005,000. (Appeal from Judgment of Supreme Court, Erie County, Flaghery, J. — Negligence.) PRESENT: CALLAHAN, *J.P.*, DOERR, BOOMER, GREEN, BALIO, *JJ.*

Order Denying Motion for Leave to Appeal to the Court of Appeals Entered October 4, 1991

SUPREME COURT OF THE STATE OF NEW YORK

Appellate Division, Fourth Judicial Department

Motion No. 349/91

PRESENT: CALLAHAN, *A.P.J.*, DOERR, BOOMER, GREEN, BALIO, *JJ.*

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

The above-named appellant having moved for reargument or in the alternative, leave to appeal to the Court of Appeals from the order of this Court entered June 7, 1991,

Now, upon reading and filing the affidavit of Richard F. Griffin sworn to July 24, 1991, the notice of motion with proof of service thereof, the opposing affidavit of William A. Quinlan sworn to August 27, 1991, and due deliberation having been had thereon,

It is hereby ORDERED That, the motion be, and the same hereby is, denied.

Entered: October 4, 1991 CARL M. DARNALL, Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARL M. DARNALL, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, *I have hereunto set my hand and affixed the seal of said Court of the City of Rochester, New York, this 4th day of October, 1991.*

(SEAL)

CARL M. DARNALL
Clerk.

Order Denying Motion for Leave to Appeal to the Court of Appeals Dated December 23, 1991

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-third day of December, A. D. 1991.

PRESENT: HON. SOL WACHTLER, *Chief Judge presiding.*

4-13 Mo. No. 1264

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

DONALD M. SHERAW
Donald M. Sheraw
Clerk of the Court

State of New York
Court of Appeals

(SEAL)

Donald M. Sheraw
Clerk of the Court

Clerk's Office
Albany, New York 12207

DECISION December 23, 1991

4-13 Mo. No. 1264

FRANK ESCHBERGER,

Respondent,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

Order Denying Defendant's Post-Trial Motions and Granting Plaintiff's Cross-Motion Dated June 8, 1990 and Granted September 4, 1990

At a Special Term of the Supreme Court held in and for the County of Erie at the Erie County Hall in the City of Buffalo, New York on June 8, 1990.

PRESENT: *HON. Thomas P. Flaherty, J.S.C.*
Justice Presiding

STATE OF NEW YORK
SUPREME COURT — COUNTY OF ERIE

FRANK J. ESCHBERGER,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Index No. H-53356

ORDER

Defendant Consolidated Rail Corporation having moved for a judgment setting aside the verdict of the jury or a new trial; and the plaintiff Frank J. Eschberger having cross-moved for an order to raise the ad damnum clause from four million dollars ($4,000,000) to five million four hundred thirty-seven dollars ($5,437,000), and the motions having come on regularly to be heard;

Now upon reading and filing the Notice of Motion of the defendant Consolidated Rail Corporation for a judgment setting aside the verdict or a new trial dated May 9, 1990, Post-trial motion for judgment or new trial, dated May 9, 1990, the Affidavit of Richard F. Griffin, sworn to on the 9th day of May, 1990, the Affidavit of Thomas R. Emmerling, CPA, sworn to on the 7th day of May, 1990, the Appendix to defendant's post trial motion dated May 9, 1990 and Supplemental Appendix to defendant's post-trial motion dated May 16, 1990, and the reply affidavit of Richard Griffin, sworn to on the 6th day of June, 1990, all in support of defendant's motion; the Affidavit in opposition of Paul W. Beltz, sworn to on the 23rd day of May, 1990; and

Upon reading and filing plaintiff's Cross-motion to raise the ad damnum clause dated May 23, 1990 and Affidavit of Paul W. Beltz, sworn to on the 24th day of May, 1990 with exhibits thereto attached in support of plaintiff's cross-motion and the affidavit of Richard F. Griffin, sworn to on the 6th day of June, 1990 with exhibits thereto attached, in opposition thereto; and

Now upon hearing MOOT & SPRAGUE (Richard F. Griffin, of counsel) in support of defendant's motion for judgment setting aside the verdict or a new trial and in opposition to plaintiff's cross-motion to raise the ad damnum clause; and PAUL WILLIAM BELTZ, P.C. (Paul W. Beltz, of counsel) in opposition to defendant's motion for judgment setting aside the verdict or a new trial and in support of plaintiff's cross-motion to raise the ad damnum clause, it is hereby

ORDERED that the defendant's motion for judgment to set aside the verdict or a new trial is hereby denied; and it is further

ORDERED that plaintiff's cross-motion to raise the ad damnum clause from $4,000,000 to $5,437,000 is hereby granted.

s/ THOMAS P. FLAHERTY
Justice of the Supreme Court

ENTER:
Granted
Sep. 4, 1990
s/ NANCY L. HART

Judgment Appealed From

STATE OF NEW YORK
SUPREME COURT – COUNTY OF ERIE

FRANK J. ESCHBERGER,

Plaintiff,

vs.

CONSOLIDATED RAIL CORPORATION,

Defendants.

Index No. H-53356.

JUDGMENT AND BILL OF COSTS

The issues in the above-entitled action having duly come on for trial before HONORABLE THOMAS P. FLAHERTY, Justice of the Supreme Court, Erie County, and a jury in the Supreme Court, on April 2, 1990, and the parties having appeared in person and by their attorneys and the allegations and proofs of the parties having been heard; and the issues in said action having been duly submitted to the jury, and the jury having returned a verdict in favor of the plaintiff FRANK J. ESCHBERGER and against the defendant CONSOLIDATED RAIL CORPORATION in the sum of $5,437,000, and said verdict having been duly entered in the minutes of the court;

And the costs and disbursements of the plaintiff in said action having been duly taxed in the sum of $1,411.50; and

Interest thereon being taxed on the verdict from the date of April 26, 1990, to date, in the sum of $81,778.43 is hereby

ADJUDGED that the plaintiff FRANK J. ESCHBERGER of %%$ Fulton St. in Buffalo, N.Y. does recover of the defendant CONSOLIDATED RAIL CORPORATION OF 2929 Walden Avenue in Depew, N.Y. the sum of $5,437,000 together with interest thereon up to the present in the sum of $81,778.43; and it is further

ADJUDGED that the plaintiff FRANK J. ESCHBERGER does recover of the defendant CONSOLIDATED RAIL CORPORATION costs and disbursements as taxed herein in the sum of $1,411.40; and that plaintiff has execution therefor in the total sum to date of $5,520,189.93 against the defendant.

Judgment signed and filed this 27 day of June, 1990

s/ DAVID SWARTS
Erie County Clerk

Bill of Costs Annexed to Judgment

SUPREME COURT
COUNTY OF ERIE

FRANK J. ESCHBERGER,

Plaintiff,

against

CONSOLIDATED RAIL CORPORATION,

Defendant.

Index No. H-53356.

COSTS OF PLAINTIFF

COSTS		DISBURSEMENTS	
Costs before note of issue CPLR 8201 subd. 1	$ 200.00	Fee for index number CPLR 8018 (a)	$
Costs after note of issue CPLR 8201 subd. 2	200.00	Referee's fees CPLR 8301 (a) 1	
Trial of issue CPLR 8201 subd. 3	300.00	Commissioner's compensation CPLR 8301 (a) 2	
Allowance by statute CPLR 8302 (a) (b)		Clerk's fee, filing notice of pend. or attach CPLR 8018 (e) 8021 (a) 12	
Additional allowance CPLR 8302 (d)		Clerk's fee cancel. notice of pend. CPLR 8021 (a) 12	
Motion costs CPLR 8202		Entering and docketing judgment CPLR 8301 (a) 7 8016 (a) 2	3.00
Appeal to App. Div. or App. Term before argument CPLR 8203 subd. 1		Paid for searches CPLR 8301 (a) 10	
Appeal to App. Div. or App. Term for argument CPLR 8203 subd. 2		Affidavits and acknowledgments CPLR 8009	
Appeal to Court of Appeals before argument CPLR 8204 subd. 1		Serving copy summons and complaint CPLR 8011 (c) 1 8301 (d)	12.00
Appeal to Court of Appeals for argument CPLR 8204 subd. 2		Note of issue CPLR 8020 (a)	120.00
Costs		Paid referee's report CPLR 8301 (a) 12	
COSTS	$ 700.00	Certified copies of papers CPLR 8301 (a) 4	
DISBURSEMENTS	711.50		
TOTAL	1,411.50		

Satisfaction piece CPLR 5020 (a) 8021	
Transcript and filing CPLR 8021	
Certified copy of judgment CPLR 8021	
Postage CPLR 8301 (a) 12	
Jury fee CPLR 8020 (c) 1	
Stenographer's fees CPLR 8002 8301	348.00
Sheriff's fees on execution CPLR 8011 (b) 8012	
Sheriff's fees on attachment, arrest, etc. CPLR 8011 (a) (c)2, 3(g)	
Paid printing cases CPLR 8301 (a) 6	
Paid printing case CPLR 8301 (a) 6	
Clerk's fees Court of Appeals CPLR 8301 (a) 12	
Paid copies of papers CPLR 8016 (a) 4	
Motion expenses CPLR 8301 (b)	
Fees for publication CPLR 8301 (a) 3	
Serving subpoena CPLR 8011 (c) 1 8301 (d)	228.50
Paid for Register's Search CPLR 8301 (a) 10	
Paid for County Clerk's Search	
Paid for Loan Commissioner's Search	
Paid for U.S. District Court Search	
Paid for U.S. Circuit Court Search	
Paid for Tax Search	
Paid for Referee's Report	
Attendance of following Witnesses: CPLR 8001 (a) (b) (c) 8301 (a) 1	

ATTORNEY'S AFFIRMATION } SS.
STATE OF NEW YORK, COUNTY OF ERIE }

The undersigned, an attorney admitted to practice in the courts of this state, affirms: that he is Paul W. Beltz, the attorney(s) of record for the plaintiff in the above entitled action; that the foregoing disbursements have been or will necessarily be made or incurred in this action and are reasonable in amount and that each of the persons named as witnesses, attended as such witness on the trial, hearing or examination before trial herein the number of days set opposite their names; that each of said persons resided the number of miles set opposite their names, from the place of said trial, hearing or examination; and each of said persons, as such witness as aforesaid necessarily traveled the number of miles so set opposite their names, in traveling to, and the same distance in returning from the same place of trial, hearing or examination; and that copies of documents or papers as charged herein were actually and necessarily obtained for use.

The undersigned affirms that the foregoing statements are true, under the penalties of perjury.

Dated: June 25, 1990

s/ PAUL W. BELTZ

The name signed must be printed beneath

Paul W. Beltz, Esq.
PAUL WILLIAM BELTZ, P.C.

EXHIBIT 13

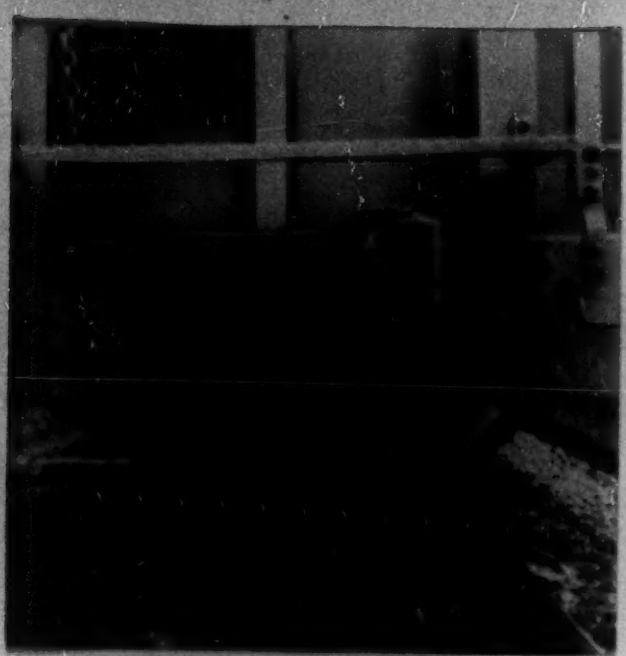

EXHIBIT 8

Federal Register, Vol. 48, No. 193,
October 4, 1983—Proposed Rules,
Pages 45272-45274

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[FRA Docket No. RSOR—7, Notice 1]

Protection of Employees During Hump Operations

AGENCY: Federal Railroad Administration (FRA), Transportation (DOT).

ACTION: Notice of proposed rulemaking (NPRM).

SUMMARY: FRA proposes to require that railroads establish procedures under which train and yard crews performing certain functions on hump yard tracks would be protected from possible injury or death as the result of unanticipated movement of the rolling equipment on which they are working. This action is being proposed in response to a joint request from the Association of American Railroads (AAR) and the United Transportation Union (UTU) that FRA establish uniform procedures for the protection of workmen in such facilities.

DATES: Written comments must be received not later than November 18, 1983. Comments received after that date will be considered to the extent possible without incurring additional expense or delay.

ADDRESS: Written comments should be submitted to the Docket Clerk, Office of Chief Counsel, FRA, 400 Seventh Street, SW., Washington, D.C. 20590. Persons desiring to be notified that their written comments have been received by FRA shall submit a stamped, self-

addressed postcard with their comments. The Docket Clerk will indicate on the postcard the date on which the comments were received and will return the card to the addressee. Written comments will be available for examination, both before and after the closing date for comments, during regular business hours in Room 7321A of the Nassif Building at the above address.

FOR FURTHER INFORMATION CONTACT: Bruce Fine, Director, Office of Safety Analysis, FRA, Washington, D.C. 20590. Telephone: 202-426-4345.

SUPPLEMENTARY INFORMATION:

Background

Railroads assemble, disassemble, and reassemble freight trains in approximately 4000 classification yards in the contiguous 48 states. In approximately 125 such yards, railroads employ a gravity feed system to assist in the classification of freight care for movement to destination. These are known as "hump yards." Although the configuration of hump yards varies considerably depending on location and yard capacity, their essential feature is a single track at the apex of a hill that branches into multiple tracks on one downward side of the hill.

Freight cars are shoved by a locomotive to the apex of the hill in long strings, uncoupled singly or in groups, and allowed to roll freely into the multiple tracts on the downward slope. Mechanical devices known as retarders are used to limit the speed at which the cars move down the hill. Routing of a car or group of cars to a particular track is accomplished by aligning the appropriate switches to direct the movement to the desired track. The group of tracks on the downside of the hill is commonly referred to as the bowl tracks of the yard.

When a freight car reaches the apex of the hill, i.e., the hump, the car is uncoupled manually. The individual in charge of the hump then activates a control panel to establish the routing for that car and to determine the amount of brake force to be applied by the retarder for controlling the speed and distance the car will be allowed to travel on the bowl tracks. After a group of cars has been allowed to enter a given bowl track, a yard crew, using a locomotive, couples the cars and connects the airhoses between them in order that they can be moved as a single unit. In performing these tasks, members of the yard crew must position themselves between the cars in such a manner that unanticipated movement of the cars poses a significant risk of injury.

Movement of the cars in the bowl results from use of the yard locomotive or from the impact of other cars entering the track from the hump. The risk of injury to members of the yard crew from unanticipated movement of the locomotive is remote since the person operating the locomotive is aware of their actions, of the risks associated with unanticipated movement, and of the need to be guided by the instructions of the exposed yard crew concerning when the cars can be moved safely. It is therefore, the risk to the yard crew from unanticipated movement caused by the impact of another car arriving from the hump the FRA is addressing in this NPRM.

Current Practices

Recent FRA field investigation disclosed that, because of reduced traffic levels, not all existing hump yards are currently in operation. At those locations presently in service, the existing procedures for avoiding the risk of unanticipated movement cause by the arrival of additional cars varies among the railroads and even

among similar facilities operated by a single railroad. Of the 91 hump yards currently operating, there are 9 facilities where no protection is provided, 17 facilities where less than positive protection is provided, and 65 facilities where positive protection is provided. At the facilities providing positive protection the method for providing protection varies from informal communication between the yard crew and the operator of the hump to positive locking out of switches that provide access to the track being worked.

Accident Data

FRA has identified seven fatalities that occurred in bowl tracks during the eight years between 1975 and 1982. In each of these accidents, FRA conducted a field investigation to determine the cause of the employee's death. Three of these accidents directly involved the issue addressed by the NPRM, and in two other instances the level of protection being afforded yard crews was relevant. In the remaining instances the fact that the employees were performing tasks in the hump yard is unrelated to the circumstances addressed in this NPRM.

FRA data concerning injuries to yard and train crews does not include the type of facility where the injuries occur; consequently, FRA cannot identify those incidents that occurred in hump yards. Within the board category of on-the-job injuries to yard crews performing similar tasks, FRA has identified more than 5,000 reportable injuries that occurred during the calendar years 1978 through 1982. FRA believes that some of these incidents occurred in bowl tracks and could have been prevented by adherence to the procedures being proposed in this NPRM. FRA's belief is buttressed by the shared concern

of rail labor and rail management expressed in their suggestion that FRA adopt regulations seeking to reduce the potential for injury in hump yards. However, to assist in further analysis of the accident data, FRA requests that commenters furnish any specific information at their disposal concerning the number of injuries to yard crews that can be attributed to the hazard addressed in this NPRM.

Section-by-Section Analysis

Section 218.39

This section would require that any railroad operating a hump yard adopt a specific rule that will mandate a minimum level of positive protection for employees. This operating rule could be incorporated in the existing Uniform Code of Operating Rules, the AAR Standard Code of Operating Rules, or an individual railroad's book of rules, general orders, timetable special instructions, or other similar documents.

FRA proposes that, in accordance with the joint recommendation of AAR/UTU, employees to be given protection are the train and engine service employees. Depending on local nomenclature, this would encompass individuals referred to as brakemen, switchmen, yardmen, conductors, yard crews, road crews, and footboard yardmasters, all of whom normally constitute train and engine service employees covered under the Hours of Service Act [45 U.S.C. 62; 49 CFR Part 228]. The railroads could extend coverage of their operating rules beyond these employees, but it is essential that train and engine service employees be provided full protection under each carrier's rule.

The operating rule would require that covered employees be provided protection when engaged in coupling air hoses or adjusting coupling devices, which activities demand that they place themselves between rolling equipment. This rule would apply to components of these two general tasks, *e.g.*, replacement of airhose gaskets, turning angle cocks, and adjusting drawbars.

To provide protection, the hump operator, or similar person, would be required to activate a remotely controlled switch located near the apex of the hump, causing the switch to be aligned against movement to the affected track, and to apply a locking or blocking device to the control to prevent inadvertent use of the control mechanism. It should be noted that only this single switch must be activated to provide protection. The railroads could frame their operating rules so as to account for individual circumstances, provided only that the rule contains these essential elements. For example, computer systems could be used to provide the locking or blocking function. Each railroad would have the discretion to adopt any additional protective measures it deems appropriate.

To ensure effective protection, this regulation would, as AAR and UTU jointly recommended, require that the employees personally contact the operator of the remotely controlled switch, both to obtain protection and to permit removal of the protection. This individualized communication is necessary to preclude erroneous or inadvertent loss of protection. Although FRA is not proposing to require the use of any written log of notification for protection or removal of protection, the use of such systems would not be precluded by this proposal.

Section 218.41

This section would provide for the imposition of civil penalty sanctions for a railroad's failure to issue a rule as required by the regulation or to comply with its operating rule.

Appendix A

Appendix A to this part currently contains a detailed schedule of civil penalties setting forth FRA policy for assessment of particular monetary amounts in the event of violations. This schedule will be revised at the time an amendment based on this proposal is adopted.

Regulatory Impact

This NPRM has been evaluated in accordance with existing regulatory policies and it would be neither a "major" rule as defined under Executive Order 12291 nor a "significant" rule as defined under DOT regulatory policies and procedures. The rule would have a direct impact only on the thirty railroads that operate hump yards. To the degree that individual railroads within that group already have an analogous procedure, the rule will have virtually no economic impact. Although FRA is constrained in its analysis by the absence of well-defined economic and accident data, FRA has concluded that the rule will involve only minimal costs for the railroads and should have a positive economic impact through reduced accident costs. Because the economic impact of the regulation, as proposed, is expected to minimal, FRA has determined that further evaluation is not necessary at this time.

FRA requests that commenters provide information on the question of the economic impact of this regulation. FRA will analyze this data in determining whether to issue a final rule in this proceeding.

Since only railroads of considerable size operate hump yards, this rule would have no adverse impact on small entities. Based on the facts set forth in this NPRM, it is certified that the rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act (5 U.S.C. §601 *et seq.*). The NPRM does not constitute a significant rule under the DOT regulatory policies and procedures.

Paperwork Reduction Act

There are information collection requirements indirectly contained in this NPRM and these will be submitted to the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. No. 96-511). Until OMB approval is obtained for the information collection requirements, these provisions will not be effective. FRA specifically solicits comments on the potential paperwork burden imposed by the proposed regulations. The information collection requirements associated with this proposed rule stem from the provisions of §§217.7 and 217.9 of a related regulation. That regulation [49 CFR Part 217] requires all railroads to conduct periodic operational test to determine compliance with their rules and to provide the results of that testing together with a copy of their rules to FRA. The increase in the existing information collection requirements associated with adoption of this proposed rule have been submitted to OMB for review.

Public comments on the issue of information collection requirements should be directed both to FRA, in the manner provided for elsewhere in this notice, and to OMB. Communications to OMB should be submitted to Mr. Gary Waxman, Room 30001, Office of Management and Budget, New Executive Office Building, Washington, D.C. 20503.

Environmental Impact

On June 16, 1980, FRA published (45 FR 40854) revised procedures for ensuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive orders, and DOT Order 5610.1C.

These FRA procedures require that an "environmental assessment" be performed prior to all major FRA actions. The procedures categorically exempt certain actions from the requirements for an environmental assessment because they are not major actions.

The FRA environmental procedures also contain a provision that enumerates seven criteria which, if met, demonstrate that a non-categorically exempt action is not a "major" action for environmental purposes. These criteria involve diverse factors, including the availability of adequate relocation housing; the possible inconsistency of the action with Federal, State or local law; the possible adverse impact on natural, cultural, recreational, or scenic environments; the use of properties covered by section 4(f) of the DOT Act; and the possible increase in traffic congestion. This proposed rule meets the seven criteria that establish an action as a non-major action.

Public Participation

Interested persons are invited to participate in this proceeding by submitting written data, views, or comments. Communications should identify the regulatory docket number and notice number and must be submitted in triplicate to the Docket Clerk, Office of Chief Counsel Federal Railroad Administration, 400 Seventh Street SW., Washington, D.C. 20590. Persons

desiring that receipt of their communications be acknowledged should attach a stamped, pre-addressed postcard to the first page of their communication. Communications received before November 18, 1983, will be considered before final action is taken on the proposed rule. All comments received will be available for examination by interested persons at any time during regular business hours in Room 7321A, Nassif Building, 400 Seventh Street S.W., Washington, D.C. 20590.

FRA has not scheduled a public hearing on this proposal since the facts do not warrant it. However, if requested by interested parties to provide an opportunity for oral comment, FRA will provide for a public hearing.

List of Subjects in 49 CFR Part 218

Railroad safety.

In consideration of the foregoing, FRA proposes to amend Part 218, Title 49, Code of Federal Regulations, as set forth below:

The Proposed Rule

1. 49 CFR Part 218 is amended by adding a new §218.39, to read as follows:

§218.39 Hump Operations.

After January 1, 1984, each railroad that operates a hump yard facility must have in effect an operating rule that substantively adopts the following provisions:

(a) When a train or engine service employee is required to couple an air hose or to adjust a coupling device and that activity will require that the employee place himself between pieces of rolling equipment located on a bowl track, the operator of any remotely controlled

switch that provides access from the apex of the hump to the track on which the rolling equipment is located shall be notified.

(b) Upon such notification, the operator of such remotely controlled switch shall line it against movement to the affected bowl track and shall apply a locking or blocking device to the control for that switch; and

(c) The operator shall then notify the employee that the requested protection has been provided and shall remove the locking or blocking device only after being notified by the employee that protection is no longer required on that track.

2. 49 CFR Part 218 is amended by adding a new §218.41, to read as follows:

§218.41 Prohibited acts.

A railroad is subject to a penalty, as provided in Appendix A, of this part, if it (a) fails to issue an operating rule as required by section 218.39 of this part or (b) fails to comply with its operating rule issued pursuant to section 218.39 of this part.

[Sec. 202, 84 Stat. 971 (45 U.S.C. §431); sec. 1.49(m) of the Regulations of the Secretary of Transportation (49 CFR 1.49(m)]

Issued in Washington, D.C., September 15, 1983.

Thomas A. Till,

Acting Administrator.

[FR Doc. 83—26732. Filed 10-3-83; 8:45 am]

BILLING CODE 4910—06—M

**Federal Register, Vol. 49, No. 36,
February 22, 1984—Rules and Regulations,
Pages 6495-6497**

DEPARTMENT OF TRANSPORTATION

Federal Railroad Administration

49 CFR Part 218

[FRA Docket No. RSOR-7, Notice 2]

Protection of Employees During Hump Operations

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: This document amends FRA's Railroad Operating Rules to require that railroads establish procedures under which train and yard crews performing certain functions on hump yard tracks will be protected from injury as the result of unanticipated movement of the rolling equipment on which they are working. This action responds to a joint request from the Association of American Railroads (AAR) and the United Transportation Union (UTU) that FRA establish uniform procedures for the protection of workmen in such facilities.

EFFECTIVE DATE: March 23, 1984.

FOR FURTHER INFORMATION CONTACT: Bruce Fine, Director, Office of Safety Analysis, FRA, Washington, D.C. 20590. Telephone: 202—472—4770.

SUPPLEMENTARY INFORMATION:

Background

Railroads assemble, disassemble, and reassemble freight trains in approximately 4,000 classification yards in the continuous 48 states. In approximately 125 such yards, railroads employ a gravity feed system to assist in the classification of freight cars for movement to destination. These are known as "hump yards." Although the configuration of hump yards varies considerably depending on location and yard capacity, their essential feature is a single track at the apex of a hill that branches into multiple tracks on one downward side of the hill.

Freight cars are shoved by a locomotive to the apex of the hill in long strings, uncoupled singly or in groups, and allowed to roll freely into the multiple tracks on the downward slope. Mechanical devices known as retarders are used to limit the speed at which the cars move down the hill. Routing of a car or group of cars to a particular track is accomplished by aligning the appropriate switches to direct the movement to the desired track. The group of tracks on the downside of the hill is commonly referred to as the bowl tracks of the yard.

When a freight car reaches the apex of the hill, *i.e.*, the hump, the car is uncoupled manually. The individual in charge of the hump then activates a control panel to establish the routing for that car and to determine the amount of brake force to be applied by the retarder for controlling the speed and distance the car will be allowed to travel on the bowl tracks. After a group of cars has been allowed to enter a given bowl track, a yard crew, using a locomotive, couples the cars and connects the airhoses between them in order that they can be moved

as a single unit. In performing these tasks, members of the yard crew must position themselves between the cars in such a manner that unanticipated movement of the cars poses a significant risk of injury.

Movement of cars in the bowl results from use of a yard locomotive or from the impact of other cars entering the track from the hump. The risk of injury to members of the yard crew from unanticipated movement of the locomotive is remote since the person operating the locomotive is aware of their actions, of the risks associated with unanticipated movement, and of the need to be guided by the instructions of the exposed yard crew concerning when the cars can be moved safely. It is, therefore, the risk to the yard crew from unanticipated movement caused by the impact of another car arising from the hump that FRA is addressing in this rule.

In response to a joint recommendation from the AAR and the UTU, FRA published a proposed rule to address this problem on October 4, 1983 (49 FR 45272). All eight commenters responding to that notice urged adoption of the proposed rule.

Three of the commenters suggested that FRA expand the coverage of the proposed rule as to both the type of facilities and the type of employees. FRA has decided not to implement these suggestions in adopting this final rule. To expand the application of this rule beyond hump yards would significantly alter the nature of the AAR/UTU recommendation and the impact of the rule. The AAR/UTU recommendation and the FRA's proposed rule would apply to fewer than 125 locations, whereas the suggested expansion of this rule to include all yard facilities would bring some 4,000 yards within its scope. Such broadened applicability would be beyond the scope

of the notice of FRA's proposal and is not warranted either by the nature of the hazard presented in non-hump yard operations or by the available accident statistics. Nor has FRA adopted the suggestion for expanding the type of employees who are to be provided improved protection at hump yards. Those not covered by this final rule already receive adequate protection under a different set of regulatory provisions.

Several commenters suggested that FRA clarify the applicability of the proposed rule. The first area of clarification sought by these commenters involves the use of hump yards that either lack a remote control capability or, having it, are being operated without its use. Since FRA can identify only a handful of hump yards that lack remote control capability, FRA does not intend to bring operations at those facilities within the scope of this regulation. In those instances where a hump yard is capable of being remotely controlled but is functioning in a manual mode, the facility is normally underutilized or experiencing technical problems with its remote control devices. Compliance with this regulation does not appear to be warranted in either instance. FRA has added the words "remotely controlled" as a description in the regulatory language to indicate that the rule does not apply to manual humps or to remotely controlled humps that are functioning in a manual mode.

One commenter expressed concern over its ability to comply with the regulation at a single facility where routing functions for switches are computer controlled. The commenter indicated that a specially designed wedge would be inserted to prevent computer override of the desired alignment of the switch at that facility. The insertion of that wedge would be performed at the direction of the remote control operator. FRA believes

that the insertion of this wedge would provide the appropriate level of protection and that alteration of the proposed rule language to specifically sanction that practice is not necessary.

The remaining comments sought clarification of FRA intent in adopting this rule so as to address possible compliance issues. One commenter sought assurance that humping operations on a particular track can be resumed if the employees working on that track have completed their initial tasks. Such intermittent humping is permissible if the employees have been appropriately notified and are again provided with protection before they resume the tasks that expose them to risk. In a similar vein, a commenter noted that normal switching operations, when the hump is not in service, would not expose the switch crew to danger of unanticipated movement caused by the arrival of cars from the hump and that compliance with the regulation should not be necessary for those switching moves. FRA agrees with that commenter's interpretation since the rule is intended to protect employees only from hump operations.

The final comment concerning FRA's intent involved the details of the notification procedure. According to the commenter, there are a number of facilities where the yardmaster or hump supervisor would be the person contacted by the crewmembers. This person would then instruct an individual at the control machine to apply the blocking or locking device. This relay system is used since the person at the control machine does not have immediate access to the appropriate communication equipment for contacting crewmembers. The commenter sought assurance that the use of the yardmaster or hump supervisor to bridge the personal communication

gap between the crewmember and the control operator was permissible. FRA's regulatory language does not preclude that practice and FRA believes that such a practice should result in reliable notification procedures.

Regulatory Impact

This final rule has been evaluated in accordance with existing regulatory policies. It is neither a "major" rule as defined under Executive Order 12291 nor a "significant" rule as defined under DOT regulatory policies and procedures (44 FR 11034). The rule will have a direct impact only on the thirty railroads that operate hump yards. To the degree that individual railroads within that group already have an analogous procedure, the rule will have virtually no economic impact. Although FRA is constrained in its analysis by the absence of well-defined economic and accident data, FRA has concluded that the rule will involve only minimal costs for the railroads and should have a positive economic impact through reduced accident costs. Although FRA specifically requested information on the economic impact of this regulation, none of the commenters addressed this issue. Since FRA originally concluded that the economic impact is expected to be minimal and has received no information to the contrary, FRA has determined that further evaluation is not necessary.

Since only railroads of considerable size operate hump yards, this rule will have no adverse impact on small entities. Based on the facts set forth in this final rule, it is certified that the rule will not have a significant economic impact on a substantial number of small entities under the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

Paperwork Reduction Act

There are information collection requirements indirectly contained in this final rule and these have been submitted to the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511). Although FRA specifically solicited comments on the potential paperwork burden imposed by the proposed regulations, no comments on this issue were received. The indirect information collection requirements associated with this proposed rule stem from the provisions of §§217.7 and 217.9 of a related regulation. That regulation (49 CFR Part 217) requires all railroads to conduct periodic operational tests to determine compliance with their rules and to provide the results of that testing together with a copy of their rules to FRA. The increase in the existing information collection requirements associated with adoption of this proposed rule has been approved by OMB (OMB Approval No. 2130-0035).

Environmental Impact

On June 16, 1980, FRA published (45 FR 40854) revised procedures for ensuring full consideration of the environmental impacts of FRA actions as required by the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*), other environmental statutes, Executive Orders, and DOT Order 5610.1C.

These FRA procedures require that an "environmental assessment" be performed prior to all major FRA actions. The procedures categorically exempt certain actions from the requirements for an environmental assessment because they are not major actions.

The FRA environmental procedures also contain a provision that enumerates seven criteria, which, if met, demonstrate that a non-categorically exempt action is not a "major" action for environmental purposes. These criteria involve diverse factors, including the availability of adequate relocation housing; the possible inconsistency of the action with Federal, State or local law; the possible adverse impact on natural, cultural, recreational, or scenic environments; the use of properties covered by section 4(f) of the DOT Act; and the possible increase in traffic congestion. This proposed rule meets the seven criteria that establish an action as a non-major action.

List of Subjects in 49 CFR Part 218

Occupational safety and health. Penalties. Railroad employees. Railroads.

PART 218—[AMENDED]

In consideration of the foregoing, FRA is amending Part 218, Title 49, Code of Federal Regulations, as set forth below:

1. 49 CFR Part 218 is amended by adding a new §218.39, to read as follows:

§218.39 Hump operations.

After June 30, 1984, each railroad that operates a remote control hump yard facility must have in effect an operating rule that adopts the following provisions in substance:

(a) when a train or engine service employee is required to couple an air hose or to adjust a coupling device and that activity will require that the employee place himself

between pieces of rolling equipment located on a bowl track, the operator of any remotely controlled switch that provides access from the apex of the hump to the track on which the rolling equipment is located shall be notified;

(b) upon such notification, the operator of such remotely controlled switch shall line it against movement to the affected bowl track and shall apply a locking or blocking device to the control for that switch; and

(c) the operator shall then notify the employee that the requested protection has been provided and shall remove the locking or blocking device only after being notified by the employee that protection is no longer required on that track.

2. 49 CFR Part 218 is amended by adding a new §218.41, to read as follows:

§218.41 Prohibited acts.

A railroad is subject to a penalty, as provided in Appendix A of this part, if it (a) fails to issue an operating rule as required by §218.39 of this part or (b) fails to comply with its operating rule issued pursuant to §218.39 of this part.

3. 49 CFR Part 218 is amended by revising Appendix A to read as follows:

APPENDIX A—SCHEDULE OF CIVIL PENALTIES

Section		Violation	Intentional violation[1]
218.23	Blue signal display	$750	$2,000
218.25	Workmen on main track	750	2,000
218.27	Workmen on other than main track	750	2,000
216.19	Alternate methods of protection	750	2,000
218.30	Remotely controlled switches (a) and (b)	750	2,000
	(c)	500	1,000
218.41	Prohibited acts:		
	(a) No rule adopted	500	2,000
	(b) Rule compliance	750	2,000

[Sec. 202.84 Stat. 971 [45 U.S.C. 431]; sec. 1.49(m) of the Regulations of the Secretary of Transportation (49 CFR 1.49(m))]

Issued in Washington, D.C. on February 14, 1984.

John H. Riley,

Administrator.

[FR Doc. 84-4403 Filed 2-21-84, 8:45 am]

BILLING CODE 4910—06—M

[1] For the purposes of this schedule, an intentional violation is the knowing and willful failure of a carrier, its officers or agent to comply with the provisions of this part. The Administrator reserves the authority to assess the maximum penalty of $2,500 for a violation of any section contained in Part 218.

Conrail Safety Rule 1711

1711. Before fouling, going between or underSTANDING equipment for inspection, adjustment, repairs or any other purpose:

(a) Arrangements for protection must be originated and terminated only by the employee who fouls, goes between or under the equipment.

(b) Have a thorough understanding with other employees involved so that no signals to move will be given.

(c) Make sure that protection has been provided against any approaching equipment on the same track.

(d) If a locomotive is attached, give a hand stop signal to the engineer and wait for his audible or visible acknowledgment by hand signal or one long sound of the locomotive whistle or horn.

(e) Be sure that the slack has adjusted.

(f) Equipment must be separated by a distance of at least 30 feet before any drawbar, knuckle, hose, or other between equipment adjustment is made.

(g) Foot must not be used to make adjustment.

(h) Stand to the side of instead of in front of cushioned underframe coupler.

(i) Know that the equipment will not move.

(j) If necessary to go under car, keep all parts of body at least 4 feet from wheels when crossing the rail.

No. 91-1524

Supreme Court, U.S.
FILED
APR 3 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent, Frank J. Eschberger, objects to the assertion that the normal side-to-side movement of non-defective couplers is so great that there is a frequent need for non-defective drawbars to be realigned in order to effect the coupling that must occur automatically under 45 U.S.C. §2. A more appropriate question presented is:

Does Section 2 of the Safety Appliance Act continue to impose liability regardless of fault or of proof of defectiveness of equipment if a coupling does not take place without a worker going between the cars, as long as one coupler is in the open position?

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IN THE

Supreme Court of the United States

October Term, 1991

No. 91-1524

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Whether or not petitioner or the government has promulgated rules for employees to follow in the event 45 U.S.C. §2 is violated is irrelevant. This statute, as this Court has previously held, imposes absolute liability on its own terms without regard to proof of negligence, so the rules cited by petitioner at pages 5-6 of the petition cannot be used to negate liability under the statute.

Respondent testified that the drawbar and its surrounding housing were defective (R. 681-682, 698-699, 714-716, 1135, 1138-1139) (Respondent's Appendix [hereinafter RA] RA3-RA7, RA9). He merely testified on cross-examination that he found no mechanical defect with the car as a whole. Petitioner produced no evidence whatsoever that the drawbar of the accident railroad car was "slewed" over to one side before it came in contact with the next car. Petitioner failed to inspect the accident car for defects, in violation of its own rules (R. 404, 406-408, 1604, 1605) (RA1, RA10). Since there was no testimony of any drawbar misalignment prior to contact with the next car, and since respondent could not prove that this drawbar and coupler were not defective without inspection, the trial court properly held that there had been no proof sufficient to justify submission of a misaligned drawbar defense to the jury. The Appellate Division, Fourth Department, likewise held that petitioner had failed to prove its entitlement to such a defense, if it exists.

ARGUMENT

POINT I

THE INSTANT CASE DOES NOT PROVIDE A RIPE OPPORTUNITY TO DETERMINE THE EXISTENCE OF A DRAWBAR MISALIGNMENT DEFENSE TO THE FEDERAL SAFETY APPLIANCE ACT.

The instant case does not present a ripe opportunity to decide whether a "misaligned drawbar defense" to liability under 45 U.S.C. §2 exists, contrary to the assertions made by petitioner.

The courts below have already determined that petitioner was not entitled to assert a misaligned drawbar defense, if such defense exists.

> Even if we were to recognize a misalignment defense to FSAA (Federal Safety Appliance Act), as urged by defendant, we conclude that defendant failed to meet its burden of proving that the misalignment of the drawbar was not the result of an equipment defect (see *Maldonado v. Missouri Pacific Railway Co.*, 798 F.2d 764, 770, cert. denied 480 U.S. 932).

Eschberger v. Consolidated Rail Corporation, _____ A.D.2d _____, 572 N.Y.S.2d 539, 540 (4th Dept. 1991) (Petitioner's appendix page 4a).

The *Maldonado* court recognized that the fact that couplers are so misaligned that an automatic coupling cannot be effected may, in itself, be evidence that the drawbar is defective.

> Evidence that the drawbars were misaligned so as to prevent coupling places a burden on the railroad to produce evidence tending to show a separate cause for the failure to couple. This is so because a failure to couple due to a deficiency in the equipment, such

> as a drawbar with more lateral play than is appropriate for normal operation, clearly amounts to a violation of the FSAA.

Maldonado, supra, 798 F.2d at 768.

Since misalignment may, in itself, be evidence of a defective drawbar, the *Maldonado* case would require affirmative proof that the drawbar was not defective. Petitioner could not meet that burden in the case at bar.

For this Court to make a pronouncement in the instant case concerning the existence of a misalignment defense would amount to nothing more than the issuance of an advisory opinion, since it has already been determined that petitioner failed to prove facts sufficient to apply it. This Court has previously stated that overseeing the resolution of factual issues by the courts below is not a goal to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts" *United States v. Johnson*, 268 U.S. 229, 227 (1925).

Under similar circumstances, this Court denied certiorari in *Maldonado v. Missouri Pacific Railroad Co.*, 798 F.2d 764 (5th Cir. 1986), cert. denied 480 U.S. 932 (1987).

The statements in the *Maldonado* case concerning the existence of a misalignment defense were merely dicta, because the *Maldonado* court held that even if the existence of a misalignment defense was conceded for the purposes of argument, there was no proof of such misalignment before the cars came together:

> Here there is no evidence suggesting a cause or explanation for misalignment of the drawbar (or even that the drawbar was misaligned). Therefore, we do not have to decide whether Missouri Pacific, with appropriate evidence, could have raised a

> defense of misalignment, because Missouri Pacific did not produce any evidence that would sustain an instruction on such a defense.

Maldonado, supra, 798 F.2d at 768.

Similarly, this Court need not determine when, if ever, a railroad may rely on drawbar misalignment as a defense because both the trial court (R. 2488-2497, 2500-2505) (RA11-RA21), and the Appellate Division correctly held that there was no evidence to justify the giving of a "misalignment defense" charge in the instant case. There was no evidence put forward in the case at bar that the drawbars were misaligned prior to the impact between the cars in question. Thus, petitioner relies only upon sheer speculation.

By contrast, the case of *Reed v. Philadelphia and New England R.*, 934 F.2d 128 (3rd Cir. 1991) would have presented a ripe opportunity to determine the existence of a drawbar misalignment defense if the *Reed* case had not been sent back for a new trial due to misconduct in summation by defendant's trial counsel.

The plaintiff in the *Reed* case testified that he saw a misalignment of drawbars before the meeting of the two cars (Unpublished District Court Opinion, pages 16-17, RA36-RA37). By contrast, in the instant case, no one testified to the position of the drawbar of the accident car before it came in contact with the car that had preceded it down the hump. Thus, the facts in this case are in sharp contrast with those of the *Reed* case on the instant issue of pre-contact misalignment.

Contrary to the assertion made at page 7 of the petition for certiorari, respondent testified that the drawbar of the car in question was defective. During cross examination he was only asked if there were mechanical defects in the cars as a whole, not whether there was a defect in the coupler or drawbar. Respondent

testified that he was injured because the drawbar was not only "slewed" all the way to one side of its housing, but it was "jammed" there and was difficult to move (R. 681-682, 698-699, 714-715, 1135) (RA3-RA7, RA9). He was injured when he was making "a sincere effort" to move the jammed drawbar (R. 719-720) (RA7-RA8).

Petitioner's rules provided that after an employee is injured while working on one of its cars, the car shall be inspected. Petitioner failed to inspect the car with this jammed drawbar, contrary to its own rules (R. 404, 406-408, 1604, 1605) (RA1, RA10). Without inspecting the car, petitioner could only speculate that the coupler or drawbar were not defective.

The argument that the failure to couple automatically could only be explained by a "slewing" of the drawbar to one side due to the car going around or stopping on a curve also rests upon nothing more than speculation. There were other cars which went around the same curve and had coupled properly (R. 654-655, 658) (RA2-RA3), which was recognized by the trial court (R. 2493) (RA14-RA15). Respondent had to manually perform coupling on at most two or three of a whole train of cars before his injury. The first car respondent had to manually couple was the eight or tenth from the engine (R. 654) (RA2-RA3). If going around a curve would invariably cause non-defective cars to have slewed drawbars, then none of the cars on the track in question would have coupled. Respondent testified that if a car is going around a curve and is not attached to any other cars, there would be no reason for the drawbar to be "slewed" over to one side (R. 1042-1043) (RA9). There was no proof that the car in question was stopped on a curve.

Thus, the instant case would not be resolved by any pronouncement this Court might make concerning the existence of a drawbar misalignment defense to the

Safety Appliance Act. Rather, the factual findings of the courts below that defendant failed to offer any proof that there was a misalignment of drawbars *before* rail cars come together, and failure to offer any proof that such a misalignment, if any, was not caused by an equipment defect, are determinative.

There was nothing unusual or precedent setting in the manner in which respondent was injured, or in the fact that a recovery under the FSAA was upheld on appeal.

Recoveries to workers who were injured while straining to align misaligned drawbars were upheld in the cases of *Clark v. Kentucky & Indiana Tenn. RR*, 728 F.2d 307 (6th Cir. 1984); *Kansas City Southern Railway Company v. Cagle*, 229 F.2d 12 (10th Cir. 1955), cert. den. 351 U.S. 908 (1956); *Byrd v. Seaboard System RR Co.*, 510 So.2d 156 (Supreme Court of Alabama 1987); *Plouffe v. Burlington Northern Inc.*, 224 Mt. 431, 730 P.2d 1148 (Supreme Court of Montana 1987); *Leveck v. Consolidated Rail Corp.*, 148 Ill. App.3d 118, 498 N.E.2d 529 (Appellate Court of Illinois, First Dept., Fifth Division 1986), leave to appeal denied 505 N.E.2d 354 (Supreme Court of Illinois 1987); *Buskirk v. Burlington Northern, Inc.*, 103 Ill. App.3d 414, 431 N.E.2d 410 (Appellate Court of Illinois, Fifth District 1982), cert. den. 459 U.S. 910 (1982); and *Schaaf v. Chesapeake & O. Ry. Co.*, 317 N.W.2d 679 (Court of Appeals of Michigan 1982), cert. den. 464 U.S. 848 (1983).

As may be seen from the above, a railroad's absolute liability to a railroad worker who is injured, not by a moving car but while moving a drawbar of a stationary car, is not some kind of radical departure from established case law under FSAA §2, as is implied by petitioner. Indeed, as is explained below, it is certain statements in the *Maldonado* and *Reed* cases that are completely at odds with all prior precedent.

POINT II

THERE IS NO "MISALIGNED DRAWBAR" DEFENSE TO THE FEDERAL SAFETY APPLIANCE ACT.

The existence of a drawbar defense would be contrary to the very motive of the Safety Appliance Act. The Safety Appliance Act is an absolute liability statute, and this Court has noted on many occasions that imposition of liability under it is not based upon proof of negligence on the part of the railroad.

> As we said in *O'Donnell v. Elgin, Joliet & Eastern R. Co.*, 1949, 338 U.S. 384, 70 S.Ct. 200, and the *Carter* case [*Carter v. Atlanta & Saint Andrews Bay R. Co.*, 338 U.S. 430, 70 S.Ct. 226], the duty under the Acts is not based upon the negligence of the carrier, but is an absolute one requiring performance 'on the occasion in question' (174 F.2d 489).

Affolder v. New York, C. & St. L. R. Co., 339 U.S. 96, 98, 70 S.Ct. 509, 510 (1950).

Liability under Section 2 of the Safety Appliance Act is not premised upon proof of defective equipment.

> "[W]e held that plaintiff does not have to show a 'bad' condition of the coupler she was entitled to a pre-emptory instruction that to equip a car with a coupler which failed to perform properly 'in the switching operation' was in violation of the Act, which rendered defendant liable for injuries proximately caused therefrom, and that neither evidence of negligence nor of diligence and car was to be considered on the question of liability. 'Further, we said a failure of equipment to perform as required by the Safety Appliance Act, is in itself an actionable wrong . . .' "

Affolder, supra, 339 U.S. at 99.

The only exception to the rule of absolute liability for failure to perform is a situation in which the couplers of the two cars that are sought to be coupled together are both closed. *Affolder, supra.*

A coupling should take place as long as one of the two couplers is open. In the case at bar, one of the couplers was open when plaintiff first noticed the failure to couple (R. 685-686) (RA4).

A situation in which a car fails to couple, allegedly due to drawbar misalignment, is distinguishable from a situation in which the failure to couple is due to two closed couplers.

First, a closed coupler can be opened from the side of the car by lifting the lift handle at the side of the car without going between the cars. A closed coupler can result not only from defective equipment but from a failure on the part of an injured plaintiff's co-employee on the railroad to follow proper procedure. Thus, a defendant railroad's victory in defeating a Safety Appliance Act claim because of two closed couplers is likely to be a Pyrrhic victory, because a two-closed coupler situation, in which one of the couplers was not defective, would almost always constitute a violation of the Federal Employers Liability Act, 45 U.S.C. §51, due to negligence of a co-employee in failure to follow proper de-coupling procedures at the top of the hump.

Second, a two-closed coupler situation is distinguishable because the failure to couple due to misalignment is, in itself, evidence that the drawbar of a coupler is out of repair, while a two-closed coupler situation is just as consistent with failure to follow proper procedure as it is with a coupler defect. This point was made in the case of *Clark v. Kentucky & Indiana Terminal Railroad*, 728 F.2d 307, 312 (6th Cir. 1984):

K & I contends, citing *Affolder* and *Cobb*, that a misaligned coupler is no basis to impose liability under §2. But in neither *Affolder* nor *Cobb*, did the facts suggest any issue concerning alignment of the two couplers. Nor did those cases reach a designation as to whether a misaligned coupler violated §2. *Affolder* merely held that a failure to couple due to two closed couplers was not a violation of §2; *Cobb* adopted the *Affolder* language. Important distinctions between closed and misaligned couplers argue against the application of *Affolder* to the latter condition.

A coupler typically has a lateral play of one to one and one-half inches on either side that permits movement of coupled cars around curves. But a coupler's lateral motion may be increased by wear. *Hallada v. Great Northern Railway*, 244 Minn. 81, 69 N.W.2d 673, 680, cert. denied, 350 U.S. 874, 76 S.Ct. 119, 100 L.Ed. 773 (1955). "[T]he customary play of an inch or a little more does not interfere with . . . coupling upon impact." *Hampton v. Des Moines & Cent. R. Co.*, 65 F.2d at 909. But "[i]f the couplers are out of alignment beyond the normal play, the coupling will not make automatically even though both knuckles are opened." *Chicago, St.P., M. & O. Ry. Co. v. Muldowney*, 130 F.2d at 974-975. In contrast, a coupler knuckle is by design either open or closed. *Hallada*, 69 N.E.2d at 690. Unlike a misalignment, the knuckle's position is not attributable to aging equipment.

As importantly, should both couplers be found in the closed position before an attempted coupling, a worker can open a knuckle by operation of the lift lever on the side of the railroad car. In order to correct a coupler so out-of-line that a successful coupling is impossible a railroad worker is required to step between the cars and make the adjustment. "In light of these differences, it is well to keep in mind that one of the basic purposes of the [FSAA] is to require the automatic coupling and uncoupling

without the necessity of men going between the cars." *Hallada*, 69 N.W.2d at 680. See also *Schaaf*, 317 N.W.2d at 681.

Consistent with overwhelming case law, then, we hold that a person injured while attempting to align a coupler in order to effect a coupling may recover through §2 of the FSAA.

As was noted in the decision of the Appellate Division, Fourth Department in the instant case, the majority of courts "... which have interpreted FSAA have concluded that the failure of railroad cars to couple automatically because drawbars were misaligned, imposed absolute liability upon the railroad (see *Metcalfe v. Atchinson, Topeka & Santa Fe Railway*, 491 F.2d 892, 893 [10th Cir. 1974] and cases cited therein)." *Eschberger v. Consolidated Rail Corp.*, _____ A.D.2d _____, 572 N.Y.S.2d 539, 540 (4th Dept. 1991).

One of the cases relied upon by defendant, *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983) is actually favorable to respondent's position. At most, the *Lewis* case establishes that there is no such thing as a technical or abstract violation of the Safety Appliance Act, divorced from an actual injury due to the necessity to go between the cars after an actual failure to couple automatically.

The *Lewis* court dealt with the propriety of a rule of practice, requiring workers to reach in between cars with a hook to fully open the knuckle of a coupler prior to sending the car down the "hump" to automatically couple with another car. The purpose of this procedure was to ensure that railroad workers would not have to go between cars to manually manipulate drawbars, as plaintiff in the case at bar was doing when he was injured.

The *Lewis* case was not a drawbar misalignment case, but the *Lewis* court clearly stated that there was no misalignment defense of the sort advocated by petitioner in the instant case:

> At the same time, however, *actual failure* to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under Section 2. See *Metcalfe v. Atchison, Topeka & Santa Fe Ry., supra*, 491 F.2d at 896 and cases cited therein. This is because Congress imposed on railroads a duty not just to provide proper equipment, but also to guarantee its performance. See *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *Delk v. St. Louis & San Francisco Ry.*, 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 1590 (1911). And FRA continued to adhere to this view of the railroad's responsibility. (See brief for appellees at page 35).

Lewis, supra, 711 F.2d at 251, footnote 39 (emphasis in original).

It should be noted that footnote 39 of the *Lewis* case refers to liability under FSAA being imposed because of a closed coupler, meaning one closed coupler. This is not inconsistent with the case of *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 70 S.Ct. 509 (1950), in which an exception for liability is found if a coupling fails as a result of *two* couplers being closed.

Neither the *Maldonado* nor the *Reed* case provides grounds for granting certiorari because they are merely aberrations from all other case law on the subject and because both are fatally flawed by a fundamental misreading of the *Lewis* case.

Both the *Maldonado* and *Reed* courts failed to recognize that footnote 39 of the *Lewis* court's opinion precluded the existence of a misalignment defense because railroads guarantee the automatic performance of their couplers under FSAA, and that if couplers fail to couple automatically, workers go between the cars at the railroad's risk.

Until the *Maldonado* case was decided, every appellate court faced with the issue had decided against the existence of a misaligned drawbar defense. See *Schaaf v. Chesapeake & O. Ry. Co.*, 317 N.W.2d 679, 680-681 (Court of Appeals of Michigan 1982), certiorari denied 464 U.S. 848 (1983).

To this day, there has not been a case upheld on appeal in which a railroad has been absolved of liability due to the application of a misaligned drawbar defense. The pronouncements concerning the existence of a drawbar defense were not dispositive in either the *Reed* case or the *Maldonado* case.

On four prior occasions, after considering petitions for certiorari in connection with the *Maldonado, Buskirk, Schaaf,* and *Cagle* cases, this Court has declined invitations to rule on the issue of the existence of a drawbar defense. Petitioner has not advanced any persuasive reasons why certiorari should be granted in the instant case.

In an argument not made to the courts below, petitioner now asserts the alleged absence or "experimental" nature of "automatic realigning" devices for the drawbars of couplers (petitioner's brief page 15, footnote 14). However, the allegedly rare nature of self-centering drawbars is belied by the facts of the instant

case, because cars on the same track as the car involved in plaintiff's accident were equipped with self-centering drawbars (R. 621-622, 671) (RA2, RA3).

Eventually, more and more railroad cars will be equipped with self-centering drawbars, which would negate any alleged misalignment that results from cars going around curves. Railroads would be less inclined to spend the money to retrofit their cars with self-centering drawbars, which would prevent injuries, if they are convinced that if workers injure themselves moving these heavy drawbars, they can defeat their claims in court through application of a misaligned drawbar defense. Thus, the purpose of the FSAA, protection of railroad workers, would best be served by denial of certiorari in the case at bar.

By spending money on self-centering drawbars which prevent injuries rather than on litigation after injury occurs, the purpose of the statute would be advanced and the question of the existence of a drawbar defense would eventually become moot.

The rule discussed in the petition, 49 C.F.R. 218.39, is totally irrelevant to this case because it was not effective until June 30, 1984 (petitioners appendix page 37a), the year after plaintiff's accident. In any event, it should again be noted that it is not just going between the cars that establishes a violation of the Safety Appliance Act, it is the occurrence of any injury due to the necessity of going between the cars as a result of a failed coupling that establishes a violation of 45 U.S.C. §2.

CONCLUSION

The petition for certiorari of Consolidated Rail Corporation should be, in all respects, denied.

Respectfully submitted,

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Dated: April 1, 1992

RESPONDENT'S APPENDIX

Excerpts of Testimony of John C. Wood

TESTIMONY OF JOHN C. WOOD—
DIRECT EXAMINATION

Q. Now, Mr.—Mr. Wood, if there has been an injury involving a piece of equipment, or train, it is the obligation of the railroad to make an inspection of that car and inspection of that equipment, is that not so? A. That's the normal and customary procedure, yes. (R. 404).

* * *

Q. Okay. And did you—did you, yourself, every make any inspection of this car or piece of equipment? A. No.

Q. Did you ask anyone else to make any inspection of this car or piece of equipment? A. No. (R. 406).

* * *

Q. So—sure. After there's a personal injury accident, you've agreed that it's proper—that the proper requirement of the railroad rules call for inspection of the piece of equipment, is that right? A. Yes.

Q. Okay. And after the—the inspection is done, that if, in fact, there's anything wrong with the equipment or anything like that, that's to be marked down, is that right? A. Yes.

Q. And if, in fact, there's nothing wrong with it, the word none is required to be written in, is that true? A. I would say that would be the appropriate word.

Q. And in this—in the form here, that is left blank, is that right? A. Yes. (R. 407-408).

Excerpts of Testimony of Frank J. Eschberger

Q. Okay. Now, Mr. Eschberger, the car that was most furtherly westerly that we're talking about, that had the drawbar on the east side of that most westerly car, what type of a drawbar and drawhead—and drawhead did that have on it? A. Well, that was a short drawbar and—and—and I believe it was—I don't believe, I know it was a self-centering drawbar. Short self-centering drawbar, I suppose you would call it.

Q. Okay. Now, Mr. Eschberger, tell us what—what do you mean by a self-centering— A. Well, there's drawheads that have—it's a shank like this, and then it will have spring in the pocket, it will have a spring on each side. If this drawhead is moved, that the spring will bring it back to center. (R. 621-622).

* * *

A. Like I say, Gerry Lakes told me to—he'd meet me on sixty-one, walk over, meet me on sixty-one.

Q. Lakes—Mr. Lakes was the conductor? A. Yes. So I—I walked directly across the—the rails of sixty-one to the next pathway that you would walk in to do your duties, and I waited there till the engine got down to where I was standing. I boarded the engine there and went down, oh, eight to ten car lengths further, I was on the front of the engine, and I pulled the lift lever on the engine because the knuckle was closed, so I pulled the lever, and it automatically opens the knuckle, and when I come to the first car on sixty-one, which is probably eight to ten cars down in there, I told the engineer to ease up and stop, and then at that point I stepped off the engine and told him to stretch 'em west, stopped 'em, and started to walk in an easterly direction down the pathway.

Q. When you say stretch 'em west, what does that mean? A. The engine will pull down any cars that he has ahold of.

Q. Back towards Bailey, right? A. Right.

Q. Bailey Avenue. Okay. After that, what did you do, Mr. Eschberger? A. I walked down the track to the east, watching for openings, or cars that wasn't coupled together.

Q. In other words, what—what now, Mr. Eschberger, what were you—what were you told to do? What was your— A. I was told to couple the track. (R. 654-655).

* * *

Q. Okay. And so, Mr. Eschberger, then go ahead and tell us what you saw and what you did, sir. A. Oh. I think I left off where I did make a coupling, maybe—maybe two or three, I don't remember how many just—just how many I made down to—how should I put it, down to the car that was involved in this particular situation we're here for. (R. 658).

* * *

Q. Okay. Now, the east and—the east end of this westerly car, the west car from the lumber car, what was the situation as far as that drawhead is concerned? A. Well, the drawhead was centered, it was—I believe it was self-centering, if I remember correctly, and the knuckle was closed. I pulled the—well, before I did anything, I called the west end yardmaster for a spike on a track, or a peg, which is the same thing. That's a—sort of a protection again. Well, getting back to that car, the drawhead was on center all right, but the knuckle was closed. I—I pulled— (R. 671).

* * *

Q. All right. Now—so now go ahead, Mr. Eschberger, and tell us then when that car came to rest, and you had this proper space between, what did you do? A. Well,

when the car stopped moving, I had the engine stopped, and the track was pegged, I observed the drawhead was completely into the—the—pushed over to the south end of the pocket. Completely over—

Q. Uh-huh. A. —to the south side of the pocket I should say. (R. 681-682).

* * *

Q. And then if the drawbar—if the drawbar is centered, and you have the—the opposite drawhead working with it in proper alignment, what is the effect of that? A. Well, it's a coupling effect. It would be just like this, two knuckles—I did open the other knuckle for—simply because when you use two open knuckles, it's easier and more sure of making a coupling, so as I said, I had that open, now I centered this, and I brought the engine—well, at that time I didn't because of this car rolling free, I knew there was a problem on the other end, but I don't want to get ahead of myself. When I finally did bring the engine ahead, he shoved the cars that we had ahold of, being this side, he shoved them. When the drawheads come together, the knuckles closed, and of course, the pins dropped and the coupling was made. (R. 685-686).

* * *

A. Well, I put—first I put my back to the car, I put my left foot on the inside of the south rail, this is the rail that the drawbar was closest to, and the right one on the outside of the rail.

Q. Mr. Eschberger, could I—could I just—I hate to interrupt you, sir, but you said you pushed—you put your back to the car. Now is that what you meant? A. Yes.

Q. Okay. All right. A. Yes.

Q. Just so we understand. A. Now the reason for putting your feet on the inside and outside of the rail was, your feet are spread and it gives you a little more balance, and you are not allowed to step on a rail, this in in the rules, you are not allowed to step on a rail, so therefore, with the amount of room, I put one foot on the inside, my right foot to the outside of the south rail, my back to the drawhead. I got ahold of the drawhead—can I demonstrate or—

Q. Well, with the permission of the Court you can.

THE WITNESS: Your Honor, may I demonstrate or not?

THE COURT: Certainly.

[523] THE WITNESS: I'm going to use this as the drawhead. I put my back to it, and I put my hand under it, grabbing hold of this drawhead, bending my legs slightly, is when—when I pull up and push in one motion. Your legs—I suppose everybody knows this, your legs are the most powerful part of your body, and any time you get into lifting motion, this is the proper way to lift, and so all in one motion, I pulled up and pushed back. The first time I pulled up and pushed was without much force. That's when I knew the drawhead was—I called it jammed, I believe. It was very hard to move. (R. 698-699).

* * *

Q. All right. Now, Mr. Eschberger, have you in prior—in prior before this accident, before your accident that night of August 6th, 1983, had you—you told us you had occasion to move these drawbars, is that right? A. Yes.

Q. And would some of them you have some difficulty with in moving, and require a sincere effort on your part to move them? A. Yes.

Q. And Mr.—Mr. Eschberger, what would cause any little jamming to take place? A. Well—

MR. GRIFFIN: Objection. Repetitious. We've been over this.

THE COURT: Overruled.

THE WITNESS: Well, sometimes these drawbars when they bypass, they're riding on a carrier iron, and sometimes, there's a word, of course, but I think I can explain it, by through the impact, there will be a little spur, or nick that is caused from the impact.

MR. GRIFFIN: Your Honor, I move to strike all this, no foundation, it's speculative, it's not related to any event in this claim, and I move to strike that.

THE COURT: Overruled.

MR. GRIFFIN: And no qualification.

Q. Mr.—Mr. Eschberger, has this been your [539] knowledge and experience from—from doing this work for this number of years that you talked about prior to August the 6th, 1983? A. Yes. I—I worked thirty years and I was a steady worker.

Q. And— A. Passed—a little over thirty years.

Q. And from your experiences in the past, when you would run into these drawbars that were slewed and jammed to some degree, can you tell us whether or not you found out that there was the little burr in the area?

MR. GRIFFIN: Objection.

THE COURT: Overruled.

THE WITNESS: Yes, I have.

MR. BELTZ: Okay.

THE WITNESS: I have seen—

MR. BELTZ: And did that burr prevent you from straightening those drawbars out and setting it up so it could be coupled?

MR. GRIFFIN: Objection.

THE COURT: Overruled.

MR. GRIFFIN: It's opinion evidence, if it please the Court.

THE WITNESS: It all depend how bad it was spurred or—or nicked or—that would depend on that.

Q. Yeah. Can you tell us whether or not you—you generally were able to move these with the nicks in them and center them? A. If it was a slight nick, you—it was within my means to move them.

Q. Right. A. There were guys, small people, that couldn't move them, you know. Where—

Q. But any rate, your experience was that you could—you could center them if they had these nicks in them, is that right? A. Yes. Yes.

Q. And to do that, would it require some good, solid effort on your part in order to do it? A. Yes. (R. 713-716).

* * *

[543] Q. And so you were telling us, Mr. Eschberger, your position and you were telling us what you did. Could you just go ahead and tell us what you did now? A. As to moving the drawhead?

Q. Right. A. Put my back to it, planted my feet as firm as possible, in a—I say pulling, as to pulling up, or lifting motion, and pushing all in one motion mind you, you're doing this in one motion, your—you—the object is, if there is a little nick on that carrier iron, you—you don't lift five hundred pound, or thousand pound piece of iron, but you take weight off it, you take as much weight off of it as possible, and that way, it will—it will pass over this nick, and it will move more freely.

Q. And so as you were pushing in this—lifting and—in the fashion that you talked about, and moving, go ahead and tell us what happened. A. Well, I—when you first get in there, you don't put everything you have into it, you don't know how hard or—it's going to be to move, so you apply—you start by applying a little pressure, and again, you—you should use your legs whenever you're lifting, and you apply a little pressure, and you feel now it's not going to move, so you apply a little more pressure, within your means, you're not [544] going to try to strain yourself to move these things, you're going to be within your means, I mean you—you'd have—I don't know what to say, you'd have to be foolish—

Q. Well, we better not— A. —to overdo it.

Q. Okay. All right. So at any rate, you tried to do in the method in which you understood was the proper method, is that right? A. Yes.

Q. Okay. And then try to tell the Court and jury, Mr. Eschberger, in your own way what happened. A. Okay. I started out trying to move it with easy motion, I found out it wouldn't move, so I put more pressure on my legs, and when I did, this drawhead come loose and swung completely to the other side, I was going back, and in order to retain my balance, my right foot was out in front of me and spread apart, and to retain my balance, I had to spin around in a half motion and—and plant my foot—I was at this time when I spun halfway around, I was completely inside the rails, and I don't want to fall down and—rails are hard, they're steel, I don't want to fall on these things, so I got—I got to catch my balance, which I'm sure everybody in this courtroom at one time had an occasion as to where they had to catch their balance— (R. 719-720).

* * *

TESTIMONY OF FRANK J. ESCHBERGER—
CROSS-EXAMINATION

Q. So that my question is, do drawbars move over to [862] one side or the other, get out of center alignment, after having gone around curves? A. After the cars is cut off and they go around the curve?

Q. Yes. A. Not to my knowledge. They're freewheeling going around this curve. I—I don't have knowledge of them just swinging over to one side or the other. (R. 1042-1043).

* * *

TESTIMONY OF FRANK J. ESCHBERGER—
REDIRECT EXAMINATION

MR. BELTZ: Well, let me ask you, Mr. Eschberger, did that drawbar move in a normal fashion or not?

THE WITNESS: No, it didn't. (R. 1135).

* * *

Q. And I don't know, Mr. Eschberger, if I've asked you but what is—what is a burr? Mr. Griffin asked you about a burr. A. A burr?

Q. Yes. In railroad parlance. A. Burr is a piece of metal that is just—oh, how would you say it, humped up, or raised up, and it's—it's on the carrier iron usually. On the carrier iron, that's what the drawbar rides on.

Q. Okay. And what did you say was humped up? A. Little piece of metal on the carrier iron. (R. 1138-1139).

* * *

Excerpts of Testimony of Michael Herr

TESTIMONY OF MICHAEL HERR—
DIRECT EXAMINATION

MR. BELTZ: I'm sorry, Your Honor. I apologize. I'll withdraw it. Mr.—Mr. Herr, I'd ask you to assume, Mr. Herr, that—that Mr. Eschberger's testified that he was injured on the railroad on August the 6th, in the early morning hours of 1983, that he reported it to his trainmaster, who in turn called the—a Mr. Wood, who was the next man in command, and Mr. Wood took Mr. Eschberger to the hospital, stayed with him while he was treated at the hospital, and that Mr. Wood in turn filled out a—a form saying that there was personal injury involved, and saying that he was supposed to go back to the hospital some hours later in that same day, and I ask you, assuming those facts to be true, Mr. Herr, do you have knowledge whether or not there was a requirement under the rules and regulations of Conrail whether or not a—an inspection was required to be made of the car involved?

THE WITNESS: Well, any time there's a personal injury involved, the trainmaster should immediately notify the car department for an inspection of that car, and if my memory serves me right, there's a form that's supposed to be filled out relating to the inspection. (R. 1604-1605).

* * *

Excerpts of Precharge Conference

[2286] MR. BELTZ: Your Honor, twenty-seven, that will be covered in your general charge, I'm sure.

THE COURT: I'm going to so charge, Mr. Griffin. Now twenty-eight, if the Court does not dismiss the Safety Appliance Act, and I did not, so the following instructions are requested.

(a) If the coupler on the railroad lumber car failed to couple automatically at any time because it was not properly set or aligned for coupling, such failure is not a violation of the Safety Appliance Act, and

(b) The mere failure of two cars to couple on impact does not establish a violation of the Safety Appliance Act. If you find that the drawbar was out of line by reason of the car having come around a curve or that it was otherwise not defective, it must be found that it was properly set so that it could couple. If it was not adjusted and aligned as automatic couplers must be in order to function properly, the failure to automatically couple at any point in the prior movement of the car would not be a violation of the Safety Appliance Act.

I—I gather—I gather, Mr. Griffin, that that—what you're requesting is basically in [2287] keeping with your motion and the Maldonado versus Missouri Pacific Railroad case. Is that substantially correct?

MR. GRIFFIN: That's true, Your Honor.

THE COURT: Yes.

MR. GRIFFIN: And you might also want to consider, because they're all related, our requests twenty-nine, thirty, and thirty-one of the supplemental.

THE COURT: Oh.

MR. GRIFFIN: Because it's—

THE COURT: Wait till I see that.

MR. BELTZ: Just—

THE COURT: Oh, I'll get to those.

MR. GRIFFIN: Because it's the same subject matter.

THE COURT: Okay.

MR. GRIFFIN: About automatic couplers.

THE COURT: Well, it's not the same subject matter, is it? Twenty-eight (a) doesn't talk about drawbars, it talks about couplers. That's—that's precisely—I thought the case you gave me, Mr. Griffin, was an excellent case, that Maldonado case. Specifically, on page seven sixty-seven, if [2288] all counsel have their copy, this is Maldonado, it's the last paragraph on seven sixty-seven, and it starts out, and I quote, the issue in the present case is whether the District Court erred in instructing the jury that it is a violation of the FSAA, quote, for the railroad to operate a car which has a drawbar sufficiently out of line that it does not couple upon impact, close quotes. Both parties contend that the cars failed to couple because of drawbar misalignment before the impact. Their dispute concerns the legal significance of this theory. Defendant urges us to read Affolder, and Affolder is a very well known determination by the Supreme Court. I thought I had the citation, but in any event—in any event, Affolder—

MR. BELTZ: Your Honor, I have it if you want it.

THE COURT: Yes, I think I see it here. That Defendant urges us to read Affolder to mean that there can be no FSAA violation unless at least one knuckle was opened, and the drawbars were properly

aligned before the attempted coupling. However, we need not determine when, if ever, a railroad may rely on drawbar misalignment because Missouri [2289] Pacific did not produce the evidence that would be required at a minimum to support such a defense, and I close quotes. Now when, as I say, the Maldonado did cite, and cite apparently with approval, that Schaaf case, and the Schaaf case held on page six eighty-one, I quote, Defendant fails to cite, and our research has not discovered, any case holding that drawbars must be properly aligned before a railroad can be found guilty of a violation of the Safety Appliance Act. The case of Affolder versus New York Central, 339 U.S. 96, is distinguishable because that case involved the failure of two cars to couple on impact because a coupler had not been properly opened. There is a crucial distinction between a coupler and a drawbar. A coupler can be opened and closed without the necessity of having someone go between any railroad cars. A drawbar, however, can only be aligned manually by someone pushing it while standing between railroad cars. And of course, what—what happened in—in Schaaf, is that the trial judge, who didn't charge in accordance with that language, his charge was criticized, and a no cause was reversed. In Maldonado, what had [2290] happened was, is that a verdict for the Plaintiff, with the drawbar misalignment language, that verdict was affirmed. And with that—with that being what I perceive to be at least the state of the law as submitted to me by counsel, Mr. Griffin, do you feel that the Defendant is entitled to a charge as stated in paragraph twenty-eight (a)?

MR. GRIFFIN: Yes, Your Honor, because as I have argued and submitted authority to the Court, and as the Maldonado case clearly indicates, and Your Honor read—read the portion, that if the—if the drawbar misalignment was due to some factor other than equipment failure or defect, such as going around a curve, which is the proof in this case, then there is nothing wrong with—you were going to stop me there.

THE COURT: No, I'm going to comment on what you said. You know the proof in this case. The Maldonado, that was your burden.

MR. GRIFFIN: Absolutely, under Maldonado.

THE COURT: You have to show why it didn't couple.

MR. GRIFFIN: And we have showed that.

THE COURT: Why?

[2291] MR. GRIFFIN: Because the Plaintiff—as Your Honor well instructed, we rely on the proof. They put the railroad witnesses on the stand, Your Honor. They put on Herr—

THE COURT: Wait a minute, Mr. Griffin, there were a lot of cars in this train that were being made up that coupled, that went around your curve. This one didn't couple.

MR. GRIFFIN: Well—

THE COURT: Same curve, same track, track—good old sixty-one. And they coupled. And this one didn't. Now, you're saying that because the Plaintiff testified that there was a curve in the track, that that meets the railroad's burden as far as equipment failure or problem?

MR. GRIFFIN: Your Honor, the only explanation—the only explanation given in this case as to the drawbar misalignment was that it went

around a curve, that it was a long car, the—there was only one long lumber car that was on this track. The proof—now if Your Honor is—is ruling on the basis of a failure of explanation, that we haven't met our burden, I don't know what more I could do, because the people who had the [2292] knowledge and explanation came in and offered that explanation.

THE COURT: I'm not sure that's so, but that's—

MR. GRIFFIN: I have—I secured the—the testimony of the witness Wood, the Plaintiff asked all those questions.

THE COURT: I understand that.

MR. GRIFFIN: The Plaintiff.

THE COURT: I understand that. It's not the Plaintiff's burden. Under Maldonado, it's your burden.

MR. GRIFFIN: But what difference, since they've done it.

THE COURT: That's your—that's your determination. Is that the way you read Maldonado? It's not the way I read your case.

MR. GRIFFIN: Your Honor—Your Honor—if—if the Plaintiff as you instructed—as you instructed the jury in—in the opening, the precharge conference, the Defendant need not call any witnesses, the Defendant could rely on the proof offered by the Plaintiff.

THE COURT: Oh, certainly.

[2293] MR. GRIFFIN: Right.

THE COURT: For the Plaintiff to establish their case.

MR. GRIFFIN: But the Plaintiff—the Plaintiff established why the drawbar was out of alignment; namely, it went around a curve.

THE COURT: That's what you say.

MR. GRIFFIN: Well, that's what the witness has said.

THE COURT: That's all right.

MR. GRIFFIN: That's the only proof in the case.

THE COURT: That's what I'm saying, that's the only proof in the case.

MR. GRIFFIN: Right. There it was out of alignment because—because of a curve problem. The positive testimony was that there was no defect in the equipment, the Plaintiff's—the Plaintiff has testified that there was no defect, there was no mechanical defect, that he reported no mechanical defect. That's the state of the record.

THE COURT: Oh, I understand. All right.

MR. GRIFFIN: If Your Honor is—let me—I mean they—they proved it, I didn't have to call [2294] the witness. Now, had they not called—had they offered no explanation, had all the Plaintiff come in and said, I came upon—I came upon a slewed drawbar without more, if that's all the Plaintiff proved, but they went on ad nauseam to develop the curves in the tracks, the long lumber car, that—the lateral play moves, and I developed that further on the cross examination, that when the car goes around a curve, it has to move, and when they cut them off at the—and so on, Your Honor, so that's all in the record.

THE COURT: Mr. Beltz.

MR. BELTZ: Your Honor, there was—there was other—other proof in this record with regard to how the drawbar could have been—could have been slewed. Furthermore, Your Honor, in—in the Maldonado case, Your Honor, it says in here that

both parties contend the cars failed to couple because of the misalignment before the impact. Your Honor, we don't have that proof in this case, we don't have that, failed to couple before the—drawbar misalignment before the impact. Your Honor, our case is clearly distinguishable from this, and they haven't cited a single case, Your [2295] Honor, that—that indicates that we don't have a solid case here, not a single case.

THE COURT: I'm not sure Maldonado was distinguishable, but I read Maldonado differently.

MR. BELTZ: Well, really supports our position is what it does. Supports our position.

THE COURT: Mr. Griffin.

MR. GRIFFIN: The proof in this case is that the Plaintiff came upon a slewed drawbar. The proof in this case is that that drawbar got slewed because of a train going around a curve, and therefore, when it came in contact with another coupler, it could not couple because it was not properly aligned. The proof is that there was no defect in the drawbar or the coupling device. The proof is then, Your Honor, that after the Plaintiff lined it up properly, it did couple automatically. That's—that's the state of the proof. Am I wrong in any respect, Your Honor?

THE COURT: I'm going to decline to charge as requested in twenty-eight. And now, that gets us to Court Exhibit 4, and this is the Defendant respectfully requests that the Court have the jury report its reorder—report its reorder— (R. 2488-2497).

* * *

THE COURT: Eleven. What is the total amount, future medical, total amount of pain and suffering Plaintiff will sustain in the future. And I'm not

going—I'm not going to charge present value as we say. Twenty-nine. The mere fact that a drawbar becomes out of alignment in the course of railroad operations, does not constitute a violation of the Safety Appliance Act. Mr. Beltz.

MR. BELTZ: Well, Your Honor, just as a statement, Your Honor, that doesn't make really—make any sense in the context of the case.

THE COURT: Mr. Griffin.

MR. GRIFFIN: I think it's very important and pertinent, Your Honor, because it's part of the foundation for the next instruction, that we don't [2299] violate the law by a drawbar going out of line, we then have a right to straighten it.

THE COURT: That's going to get it right back into that assumption of risk, isn't it? Assumption of risk of employment. The very title of the section.

MR. GRIFFIN: It's not assumption of the risk, Your Honor, I'm saying that we have a right to have our employee, we have a right to center the drawbar, and that we don't violate the Safety Appliance Act when we have somebody do that.

THE COURT: Let me see this.

MR. BELTZ: Your Honor, essentially, that—that's just the Maldonado argument all over again is what you've got, and it's just a sentence is taken out of context, a sentence that Mr. Griffin created or somebody from the office.

THE COURT: I'm looking at Schaaf, and on 680, and I quote, although no Michigan Appellate Court has yet addressed this issue, every other Appellate Court presented with this question has ruled that a misaligned drawbar is in itself enough to constitute a violation of the Safety Appliance Act. In Kansas City Southern versus Cagle, 229 Federal [2300] 2nd

12, it's the Tenth Circuit, 1955 case, the Federal Court of Appeals addressed a factual situation substantially similar to that at bar. There, an out-of-alignment drawbar was in such a condition that it would not automatically couple to railroad cars upon impact. As a result, it was necessary for an employee of the railroad to manually align the drawbar so that the coupling could be made. While doing so, an employee was injured. The Federal Court of Appeals held, quote, without exception the cases have held that operating a car on which the drawbar is so far out of line as to prevent automatic coupling violates the Safety Appliance Act and imposes absolute liability. Footnote omitted, cases cited. And going on, holding—well, I guess I must, in Hallada versus Great Northern, 244 Minnesota 81, holding that it is no defense in an action brought under the Safety Appliance Act, if the failure of drawbars to couple upon impact was caused by misalignment and cites Donnelly versus Pennsylvania Railroad Company, 342 Illinois Appeals, 556. Mr. Griffin.

MR. GRIFFIN: I don't want to be repetitious.

[2301] THE COURT: Schaaf just says the contrary to what twenty-nine requests.

MR. GRIFFIN: But it's—but it's crazy. No, it is. I mean, we have a perfectly good piece of equipment, that piece of equipment has to move laterally. There could—

THE COURT: Wait just a moment, you have a perfectly good piece of equipment. That's where I think under Maldonado you had to offer proof.

MR. GRIFFIN: No. The Plaintiff—the Plaintiff said, I was there, I worked with it, there was—

THE COURT: I remember there was a little burr, and you objected, and I sustained.

MR. GRIFFIN: A burr has got nothing to do with anything.

THE COURT: That doesn't meet your burden under Maldonado.

MR. GRIFFIN: Oh. If—if—Your Honor, we're not in the same ballpark, if you say I didn't meet my Maldonado burden, I mean—

THE COURT: I'm saying that. Let the record reflect I'm saying that, you did not meet your Maldonado burden.

[2303] MR. GRIFFIN: And that's your basis of ruling?

THE COURT: What is my basis for ruling? What does that mean? My basis of ruling, what, on everything I've ruled on since ten o'clock this morning?

MR. GRIFFIN: No, no, I'm not trying to be—in other words, my understanding is, Your Honor, that if I had met the Maldonado burden, your ruling might be otherwise?

THE COURT: It might be, yes.

MR. GRIFFIN: All right.

THE COURT: Yes.

MR. GRIFFIN: Can I address that then?

THE COURT: Sure.

MR. GRIFFIN: Can I address it then? Maldonado says—the context of Maldonado is that a man came in and said, I had a misaligned drawbar and I got hurt.

THE COURT: Right.

MR. GRIFFIN: That was the record in that case.

THE COURT: Correct.

MR. GRIFFIN: And the railroad said well, that doesn't necessarily mean there's anything wrong [2303] with it, the fact that it's out of alignment, and the Court said wait a minute, we don't know why it was out of alignment. You, railroad, you have to come in and show—you have to come in and show why that's out of alignment. That's your burden. And if you show that it's out of alignment for some reason other than a defective device, then the Maldonado, and admittedly, it's—it's not a precise holding, but that's what they're saying, if you come forward, Mr. Railroad, and so that the reason it's not out—that it was out of alignment is not because of a defect, then you have a defense. No question that you have to have that evidence. Now—

THE COURT: Yes, but you see you have to read—you can't just take Maldonado that way, because you have to read Affolder and you have to read your Maldonado case. I mean, you just don't read it alone.

MR. GRIFFIN: Well—

THE COURT: I'm going to decline to—I think the record really reflects your position, and I'm not going to charge twenty-nine. Thirty, Mr. Griffin. The Defendant has a right—I really (R. 2500-2505).

* * *

Unpublished District Court Opinion

[1] IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 87-4763

JAN 31 1991

ENTERED 1/31/91

CHARLES N. REED,

v.

PHILADELPHIA, BETHLEHEM & NEW
ENGLAND RAILROAD COMPANY.

MEMORANDUM

HUYETT, J. JANUARY 29, 1990

This is an action under the Federal Safety Appliance Act ("FSAA"), 45 U.S.C. §§1-43(a). A jury trial was held on August 21, 1990 through August 23, 1990, in which the jury found in answer to special interrogatories that the defendant Philadelphia, Bethlehem & New England Railroad Company ("PBNE") had *not* violated the FSAA.[1] On August 28, 1990, the Clerk entered judgment in favor of defendant PBNE and against plaintiff Charles N. Reed.

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[1] Special interrogatory Number 1 asked: "Do you find that the defendant violated Section 2 of the Federal Safety Appliance Act?" The jury answered "no." *See* Tr. 8/23/90 at p. 113.

Plaintiff has filed a motion for a new trial, and defendant has responded. In his motion, plaintiff raises many issues. In this Memorandum, I shall discuss six of those issues. Any issues raised by plaintiff which I do *not* discuss in this Memorandum have been considered and found to be without merit.

[2] I. DISCUSSION

A.

First, plaintiff contends that this Court committed error when, subsequent to the closing argument of plaintiff's counsel, it permitted defendant's counsel to respond to the misleading and prejudicial arguments made by plaintiff's counsel during his closing. This Court noted during a sidebar conference that plaintiff's closing argument was unfair in tone, nature, and content. While the written record does not disclose the inflammatory and emotional performance by plaintiff's counsel, the substantive accusations began with the alleged "callousness" of defendant:

> But this isn't the end. The most callous, the most indifferent, the hardest thing that I could comprehend they tried to do to you yesterday. What did they tell you? They brought somebody up on the witness stand to say, oh, 85 percent of our people retire at age 82 [sic].
>
> They told you that because they wanted you not to award Charlie any money. Hey, if he could have retired at 82 [sic], how much is his case worth? *They treated Charlie like the junk that they carries* [*sic*] *in these things.*
>
> * * * *
>
> Is this how you treat someone who gave you their entire life? By bringing in no witness? By making fancy arguments from different parts of pages?

> And then do you treat this person by telling the jury, don't give him anything, he could have retired anyway. Yeah, well Mr. Reed didn't want to retire anyway. Mr. Reed could have worked until 70. He said he was going to work to 65 because that is the
> [3] time when his son was going to graduate college. They don't have the right—they don't have the right to have you retire him at an early age and *it's callous and indifferent for them to even make that kind of argument.*
>
> Ladies and gentlemen, you are the collective conscience of this community. You represent the community and it's for you to say whether it's appropriate for a railroad—a Bethlehem Steel railroad to injure a man because their equipment is defective and in violation of the Safety Appliance Act and *then to try to deprive him of every right that he has under the law* by a Mr. Kovach with his phony report, by a Mr. Gartland or by some statistical basis as to how many people retire.

See Tr. 8/23/90 at pp. 22-23 (emphasis added). Plaintiff's counsel continued:

> Ladies and gentlemen, the life of a trial and the trial of life is the constant battle *between the callous and the concerned, the indifferent and the involved and between those who feel and those who forget.* A noted philosopher stated that man is the only animal that laughs and weeps, for he is the only animal that is struck with the difference with what things are and what they ought to be.
>
> Ladies and gentlemen, you have the power to make things what they ought to be. Thank you very much.

See Tr. 8/23/90 at pp. 30-31.

Because of this highly inflammatory and egregiously unfair emotional appeal, this Court granted defense counsel's request and permitted him to tell the jury

enough to neutralize the unfairness created by plaintiff's counsel. I permitted defense counsel to comment that plaintiff had *not* been cast aside and that he was on disability.

[4] Consistent with this ruling, defendant's counsel's entire comment about which plaintiff complains consists of twelve words out of the entire transcript:

> Mr. Barish has made comments about my clients and my callousness, disregard, et cetera. We have not cast Mr. Reed aside. Mr. Reed has been taken care of. Mr. Reed is being provided disability through a Federal system and by the company, and we have not been callous or [sic] disregard of Mr. Reed [sic] welfare or his—
>
> MR. BARISH: If the Court please—
>
> MR. BERGHOLTZ: —or his years of service with the company.

It was a brief and unrepeated part of the lengthy closing arguments of counsel (covering over 26 pages of text). It was permitted merely to counter the unfair and prejudicial position in which plaintiff's counsel had placed defendant PBNE and its counsel. It was a response which I concluded was invited by plaintiff's counsel.

The principles of law which control this alleged error are broad and well-settled. "The trial judge is in a far better position than an appellate court to evaluate the prejudice flowing from counsel's improper comments during trial and to determine the most effective response to ensure a fair trial." *Mills v. Beech Aircraft Corp.*, 886 F.2d 758, 765 (5th Cir. 1989) (citations omitted). *See also Ward v. H.B. Zachry Construction Co.*, 570 F.2d 892, 895 (10th Cir. 1978) ("Because the trial judge is in the best position to determine the effect that arguments of

counsel have upon the jury, considerable discretion is
[5] given to the trial judge in exercising supervision over arguments of counsel."); *Corbett v. Borandi,* 375 F.2d 265, 270 (3d Cir. 1967). Likewise, the Eleventh Circuit stated recently:

> Under federal law, the trial judge is given considerable discretion to control the tone of counsels' arguments and, absent an abuse of discretion, the decision of the trial court, which has had the opportunity to hear the offensive remarks within the context of the argument and to view their effect on the jury, should not be disturbed.

Allstate Insurance Co. v. James, 845 F.2d 315, 318 (11th Cir. 1988) (citation omitted). *See also Canada Dry Corp. v. Nehi Beverage Co.,* 723 F.2d 512, 527 (7th Cir. 1983) (trial court's discretion to determine whether counsel's remarks require admonition to the jury will only be upset for clear abuse).

Under these authorities and in these particular circumstances, given the tone, nature, and content of plaintiff's counsel's intentionally inflammatory, prejudicial and untrue remarks, the brevity of defendant counsel's responding comment, and this Court's reminders to the jury that statements of counsel are *not* evidence (*See* Tr. 8/21/90 at p. 32, and 8/23/90 at p. 72), I conclude that I handled this matter appropriately and preserved the fairness of the trial which plaintiff's counsel so blatantly threatened.

Plaintiff argues that this Court's supervision of his counsel's conduct was reversible error because it violated the collateral source rule. The cases which plaintiff cites, however, deal with either the issue of admissibility of evidence of collateral benefits or with extended
[6] arguments based directly on the receipt of collateral benefits. As the record demonstrates, I was *not* dealing

with an evidentiary issue or an argument based on the receipt of benefits, but rather was attempting to combat the egregious unfairness caused by plaintiff's counsel's improper argument. This Court did *not* permit, nor did defendant's counsel make, any substantive argument based on the brief remedial comment. The solution to the problem was "within the sound control and discretion of the trial judge," *Arkwright Mutual Insurance Co. v. Philadelphia Electric Co.*, 427 F.2d 1273, 1277 (3d Cir. 1970). In this case, the solution that I chose merely leveled the playing field.

In addition, the jury found in favor of PBNE on liability. Collateral benefits relate to the damages portion of the case. Given the serious injury to plaintiff, it is impossible to conclude, and plaintiff nowhere even attempts to explain, that "an element going really only to damages could result, not in a finding of no [perhaps low] damages, but one which completely exonerated the railroad." *Franklin v. Sandersville Railroad Co.*, 445 F.2d 270, 271 (5th Cir. 1971). Accordingly, I conclude that this Court did *not* commit reversible error by permitting defendant's counsel the opportunity to respond to the misleading and prejudicial arguments made by plaintiff's counsel during his closing argument.

B.

Second, plaintiff argues that this Court's failure to instruct the jury on his two theories of liability warrants
[7] a new trial. Plaintiff describes these theories as (1) "the cutting lever on the car failed to operate properly" and (2) "the cars failed to automatically couple on impact." *See* Plaintiff's Memorandum of Law at p. 7. Plaintiff contends that this Court did *not* cover these two theories in its charge to the jury.

Nothing could be further from the truth. As to plaintiff's theories of liability, I specifically charged the jury:

> Plaintiff claims that, at the time and place in question, the defendant violated the Federal Safety Appliance Act because (1) the coupler mechanism on the railroad cars failed to couple automatically on initial impact, and (2) that the cutting lever, part of the coupler mechanism, failed to function properly requiring plaintiff to step between the railroad cars in order to properly align the railroad cars for coupling. Plaintiff further alleges that his injuries were caused by either or both of these failures of the coupler mechanism to function properly at the time and place in question.

See Court's Written "Jury Instructions"[2] at p. 3; *see also* Tr. 8/23/90 at pp. 77-78. The charge directly contradicts plaintiff's unfounded allegations that "the Court did no more than mention the cutting lever" and that the only instruction given involved failure of the cars to couple automatically on impact.

Accordingly, the cases which plaintiff cites on pages 9 through 13 of his Memorandum of Law which deal with
[8] the consequences of a failure to instruct are irrelevant. The record unquestionably demonstrates that this Court properly instructed the jury on both of plaintiff's theories of liability. For plaintiff to claim otherwise is preposterous. This is particularly true given the following comment by plaintiff's counsel:

> In your charge, your Honor talks about two theories that the plaintiff has. One is a failure to couple, and the other, that the cutting lever was defective.

See Tr. 8/23/90 at p. 87.

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[2] This Court gave each juror a written copy of the substantive part of the charge which was read to the jury. As a result of objections made by plaintiff's counsel following the charge, this Court supplemented the substantive part of the charge with oral comments.

Moreover, at the request of plaintiff's counsel following the charge and with his approval, this Court repeated plaintiff's two theories of liability in an oral supplement to the charge:

> I want to tell you that you should consider my charge as a whole. And I'm going to tell you two other things and you should consider these things which I am going to tell you orally along with the written materials which you have and consider all this as a whole when you consider my instructions as to the law.
>
> And let me first say to you, as I mentioned to you, members of the jury, plaintiff has two theories of a violation of the Federal Safety Appliance Act. May I tell you that defendant's defense of misalignment applies only to plaintiff's first theory of a violation that the coupler mechanism on the railroad cars failed to couple automatically on initial impact.
>
> Plaintiff may also prove a violation of the Act by establishing that the cutting lever part of the coupler mechanism failed to function properly, requiring plaintiff to step between the railroad cares in order to properly align the railroad cars for
> [9] coupling. Defendant's defense to this theory is that the cutting lever was operable at the time of the accident.

See Tr. 8/23/90 at pp. 105-06.

The supplement to the charge repeated plaintiff's two theories of liability and elaborated on the fact that the misalignment defense applies only to the failure to couple theory of liability. Nothing in the record suggests that plaintiff "specifically requested a peremptory charge" on the other theory of liability—the inoperative cutting lever. *See* Plaintiff's Memorandum of Law at p. 13. In fact, what plaintiff's counsel actually requested was for

the court to consider adding language to reflect that misalignment is *not* a defense to the cutting lever theory. This Court properly rejected this request because it was unnecessary and repetitious. *See* Tr. 8/23/90 at p. 94. Because this Court's supplement clearly stated that the defense of misalignment applied "only" to plaintiff's failure to couple theory, I did not err in denying plaintiff's superfluous request. *Dawsey v. Olin Corp.*, 782 F.2d 1254, 1266 (5th Cir. 1986) (not error to refuse to give requested instruction as long as substance of it has been adequately covered elsewhere in court's charge).

I reminded the jury that the additional charge supplemented the charge already given: "And let me say to you, as I mentioned to you, members of the jury, plaintiff has two theories of a violation of the Federal Safety Appliance Act." Then, I went on to explain the two theories again, including the cutting lever theory. It
[10] is incredible that plaintiff now argues, without support, that the supplement to the cutting lever theory, made at plaintiff's counsel's request, "was legally insufficient to constitute a charge and constitutes reversible error." In making such a claim, plaintiff ignores completely the first part of the charge dealing with the cutting lever included in the written jury instructions. Moreover, not only did plaintiff's counsel fail to object to the supplemental charge, he actually requested and approved it.

Plaintiff's next argument concerns the fact that the written instructions were distributed to the jury. First, the written instructions are the same as the charge given and clearly include both of plaintiff's liability theories. Second, in its supplement to the charge, this Court reminded the jury to consider its charge "as a whole." *See* Tr. 8/23/90 at p. 105. *See Ramsey v. American Air*

Filter Co., 722 F.2d 1303, 1312 (7th Cir. 1985) (in reviewing adequacy of jury instructions, reviewing court must look to the instructions as a whole, in a common sense manner, avoiding fastidiousness); *SEPTA v. Transit Casualty Co.*, 412 F. Supp. 839, 845-46 (E.D. Pa. 1976) ("in determining if there is error in the Court's charge it must be read as a whole").

C.

Plaintiff also maintains that this Court violated Rule 51 of the Federal Rules of Civil Procedure by failing to instruct the jury on both of plaintiff's theories of liability as promised to plaintiff's counsel in the charge conference.

[11] The record demonstrates that this Court instructed the jury twice on each of plaintiff's liability theories—i.e., the failure to couple on initial impact and the failure of the cutting lever to operate properly. Consequently, there is no violation of Rule 51 of the Federal Rules of Civil Procedure. This Court adequately instructed the jury on the principles and concepts governing plaintiff's liability theories, including the cutting lever theory. This Court did *not* err in using its own language in the instructions, rather than the language submitted by plaintiff.

> The purpose of a jury charge is to convey legal concepts to a jury of lay persons. Trial judges may choose from an extensive dictionary of terms, words that adequately express the appropriate precepts. If the instructions are accurate in substance and understandable to lay persons, the failure to use the exact words requested by counsel is not reversible error.

Williams v. Mussomelli, 722 F.2d 1130, 1134 (3d Cir. 1983). *See also McKinnon v. Skil Corp.*, 638 F.2d 270, 274 (1st Cir. 1981) ("court need not employ the precise

language urged"). In fact, the record discloses that the liability instructions submitted by plaintiff were generally incomplete, argumentative, confusing, repetitious, and inappropriate for a jury. *See* Tr. of Charge Conference at pp. 18-22.

Moreover, even if there had been a technical violation of Rule 51, to be reversible any such error must have resulted in prejudice to one of the parties. *Acosta v. Honda Motor Co.*, 717 F.2d 828, 843 (3d Cir. 1983).
[12] Despite claiming error, plaintiff does *not* explain how he was prejudiced. Nor could he. The record demonstrates that the Court did not abuse its discretion in ruling on plaintiff's requested instructions. Furthermore, viewing the charge as a whole, it fairly, accurately, and properly submitted the issues to the jury. *Link v. Mercedes-Benz of North America, Inc.*, 788 F.2d 918, 922 (3d Cir. 1986) (standard of review for ruling on points for jury charge is an abuse of discretion; once court has given the jury charge, question is whether the charge, taken as a whole and in light of evidence, fairly and adequately submits issues to the jury).

D.

Next, plaintiff contends that this Court committed reversible error it charging the jury on the defense of misalignment, for which plaintiff asserts there was no legal or evidentiary support.

The law recognizes that a failure of automatic couplers to couple because of a misaligned drawbar is *not* a violation of section 2 of the FSAA which provides in pertinent part:

> It shall be unlawful for any railroad to haul or permit to be hauled or used on its line any car not equipped with couplers coupling automatically by

> impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

45 U.S.C. §2.

Decades ago, in *Atlantic City Railroad Co. v. Parker*, 242 U.S. 56 (1916), Justice Oliver Wendell Holmes recognized that "[s]ome lateral play must be allowed to drawheads, and further the car was on a curve which, of
[13] course, would tend to throw the coupler out of line." *Id.* at 59. Justice Holmes realized that when the normal, necessary lateral play of a drawbar creates a condition that prevents a coupling, no violation of section 2 of the FSAA occurs. In other words, unless the drawbar is properly aligned, a failure to couple is *not* a violation of section 2.

Thirty-four years after *Parker*, the Supreme Court similarly decided that a failure to couple violated section 2 of the FSAA "assum[ing] that the coupler was placed in a position to operate on impact." *Affolder v. New York, Chicago, and St. Louis Railroad Co.*, 339 U.S. 96, 99 (1950). The precise question in *Affolder* was "whether after the couplers were placed in open or proper position, they failed to couple automatically on impact." *Id.* Similarly in *Carter v. Atlantic & St. A.B.R. Co.*, 338 U.S. 430 (1949), the Court held that a defective coupler was one which failed to couple "if the coupler was properly set and failed to couple on the occasion in question." *Id.* at 434.

Accordingly, the Court in both *Parker* and *Affolder* adopt the rule that unless the entire coupling mechanism is first "properly set" (i.e., the drawbars aligned and at least one knuckle open), no violation of section 2 can occur. In *Cobb v. Union Railway Co.*, 318 F.2d 33 (6th Cir.), *cert. denied*, 375 U.S. 945 (1963), the Sixth Circuit approved an instruction reflecting the rule:

> The Court further charges you that if couplers fail to couple automatically because they are *not properly set for coupling under the circumstances,* this failure of the cars to couple is not a violation of the Safety Appliance Act, but if they fail to couple automatically by impact for any other reason, then
> [14] there would be a violation of the Safety Appliance Act. The Court further charges you that if you find by the preponderance of the evidence that cars did in fact fail to couple automatically on impact, you may infer from that fact but you are not required so to infer that the failure to couple was under such circumstances as to constitute a violation of the Safety Appliance Act.

Id. at 35-36. More recently, the Sixth Circuit accepted that "*Affolder* and *Cobb* . . . hold that no violation of §2 can be found unless the couplers were aligned and at least one knuckle open before the failed impact." *Clark v. Kentucky & Indiana Terminal Railroad,* 728 F.2d 307, 311 (6th Cir. 1984).

In *Maldonado v. Missouri Pacific Railway Co.,* 798 F.2d 764 (5th Cir. 1986), *cert. denied,* 480 U.S. 932 (1987), the Fifth Circuit put to rest any lingering doubts about the viability of the defense of drawbar misalignment. The Court in *Maldonado* stated that "drawbar misalignment should be a defense to failure to couple in instances where the misalignment which causes the noncoupling does not reflect defective or failed equipment." *Id.* at 768. In order to raise the misalignment defense, a railroad must "produce evidence tending to show that the misalignment was *not* due to equipment failure or defect." *Id.* (emphasis in original).

Both the law and the Federal Railroad Administration recognize that drawbars are *not* designed to remain in a perfectly straight and centered position. *See, e.g., United Transp. Union v. Lewis,* 711 F.2d 233 (D.C. Cir. 1983).

On the contrary, they must be and are designed to move off center position. Drawbars that slide and move
[15] provide slack and flexibility between cars and, thereby, avoid derailments as cars go around curves. Movement over track, vibration, or other normal operating conditions may cause a drawbar to move off center. In *Lewis*, the Court stated:

> That the knuckle on the coupler closes or that the drawbar goes out of alignment with the next car due to vibration or jarring does not indicate that the coupler is "defective." To be effective the coupling apparatus must permit limited lateral movement of the drawbar in order to allow the cars, when coupled together, to pass around curves without derailment and to allow coupling on a curve. Occasionally, drawbars move so far out of alignment as to preclude automatic coupling. It then becomes necessary to adjust the drawbar or the coupling knuckle, and this may require going between cars.

Id. at 235 n.5.

Next, plaintiff argues that the evidence in the record is *not* sufficient to support the charge on the defense of misalignment. In support of that position, plaintiff relies on "Mr. Laudenslager's entire relevant testimony."

Because plaintiff's counsel did *not* move for a directed verdict on this issue at the close of all evidence, this argument has been waived. "Sufficiency of the evidence is not reviewable on appeal unless a motion for direct[ed] verdict was made in the trial court at the close of all the evidence." *Dancey Co. v. Borg-Warner Corp.*, 799 F.2d 717, 721 (11th Cir. 1986). *See Gebhardt v. Wilson Freight Forwarding Co.*, 348 F.2d 129, 132 (3d Cir. 1965) (failure to move for directed verdict at the close of all the evidence foreclosed party's right to raise issue as to the sufficiency of the evidence; court below may not be held

[16] to have erred on an issue which was not properly raised). Accordingly, plaintiff has waived any argument as to the sufficiency of the evidence with respect to misalignment.

Moreover, even absent waiver, the evidence was sufficient to support the misalignment charge. The testimony of plaintiff's witness Robert Laudenslager is sufficient to permit an inference that the initial failure to couple occurred either because Mr. Laudenslager did *not* properly align the drawhead[3] or because the drawhead moved through its normal play as the scrap car rolled over the scale. *See* Tr. 8/21/90 at p. 62, pp. 72-74, and pp. 77-78. Accordingly, this testimony is sufficient to support a charge on the defense of misalignment because it demonstrated a failure to couple caused by something other than a defect in the equipment.

In addition, plaintiff testified that when the cars initially hit together, he could see that the drawheads were *not* aligned:

> Q. And as you were watching the cars, Mr. Reed, you saw that the couplers were not aligned, did you not, as they were coming together?
>
> A. I assumed that when they hit they weren't aligned.
>
> Q. You did not see that?

[17] A. I couldn't see from that distance if they were not aligned. I only assume [sic] it after the accident happened that they were aligned—weren't aligned.

MR. BERGHOLTZ: May I approach the witness again?

THE COURT: Yes.

* * * *

[3] On direct examination, Mr. Laudenslager testified that he had aligned the drawhead before he sent the scrap car over the scale. *See* Tr. 8/21/90 at p. 64. However, on re-direct, he testified that he was *not* sure if he aligned the drawhead. *See* Tr. 8/21/90 at p. 78.

Q. Again, Mr. Reed, if I could direct your attention to page 37 where we had just left off at line 4:

Question: The knuckle on the other side, wasn't?

Answer: Wasn't open.

Question: You said they weren't lined up?

Answer: That's right.

Question: How do you know that?

Answer: I was standing about 20 feet away from the car on the side.

Question: And?

Answer: I could see it when they hit.

Question: So you saw when they hit?

Answer: I saw when they hit.

Question: That they weren't aligned?

Answer: That's right.

Q. Did I read that correctly?

That's right.

See Tr. 8/21/90 at pp. 149-51.

The jury could have reasonably and logically inferred that what plaintiff saw resulted from either Mr.
[18] Laudenslager not properly aligning the drawbar or from the normal play and movement of the drawbar after Mr. Laudenslager sent the car rolling over the scale. In sum, this case presented not only sufficient evidence to support an instruction on the defense of misalignment, but also compelling evidence from plaintiff and his witness.

Plaintiff also argues that this Court erred by *not* defining certain terms used in its charge. This argument lacks merit for two reasons. First plaintiff's counsel

never objected to the charge on definitional grounds or requested clarification of any terms. He had numerous opportunities to do so, given the charge conference and the colloquies over the charge. Consequently, this argument has been waived. Second, nothing in the record even remotely suggests that the charge misled or confused the jury. To the contrary, the record demonstrates that the jury understood the charge. Shortly after beginning deliberations, the jury returned with its only question—one that had nothing to do with the charge. *See* Tr. 8/23/90 at pp. 110-12.

In addition, plaintiff argues that this Court erred in the misalignment charge by misstating the applicable burden of proof. He tries to support this conclusion by selecting a portion of the charge and implying that this Court imposed an additional burden of proof upon plaintiff.

Again, plaintiff inappropriately focuses on a small portion of the charge and ignores the whole. *See Walters v. Mintec/International*, 758 F.2d 73, 76 (3d Cir. 1985)
[19] (alleged errors in jury instructions must be evaluated in light of the instructions as a whole). The portion of the charge cited by plaintiff appears on page 79 of the transcript from 8/23/90. To put that portion in context, preceding passages are important:

> Plaintiff need *not* establish that the coupler mechanism was defective. Plaintiff need only establish that, at the time of the accident, the coupler mechanism failed to perform and operate as required under Section 2 of the Federal Safety Appliance Act.

See Court's Written "Jury Instructions" at p. 2; *see also* Tr. 8/23/90 at p. 77.

> May I tell you, members of the jury, that plaintiff establishes a violation of section 2 of the Federal Safety Appliance Act by proving that, at the time and place of the accident, the railroad cars failed to couple automatically on impact.

See Court's Written "Jury Instructions" at p. 4; *see also* Tr. 8/23/90 at p. 78.

Turning to the defense of misalignment, the Court placed the burden of proof squarely on the railroad:

> With respect to this defense of misalignment may I tell you, members of the jury, that the defendant must present evidence to show that the misalignment did *not* occur because of equipment failure. In other words, the defendant has to establish a separate cause for the failure to couple other than equipment failure.

See Court's Written "Jury Instructions" at p. 4; Tr. 8/23/90 at pp. 78-79.

Once the charge on misalignment is placed in context, plaintiff's argument that this Court misstated the applicable burden of proof collapses. I instructed the
[20] jury concisely and properly that PBNE had the burden to prove its misalignment defense. *See Wilk v. American Medical Assn.*, 719 F.2d 207, 218 (7th Cir. 1983) (reviewing court looks to instructions as a whole, in a common sense manner, avoiding fastidiousness, inquiring whether the correct message was conveyed to the jury reasonably well), *cert. denied*, 467 U.S. 1210 (1984).

E.

At the charge conference, this Court reversed its prior ruling and withdrew from evidence the one safety rule which had been admitted. Consistent with this Court's ruling, PBNE's counsel did *not* refer to the safety rule

during closing argument. Nor did the Court mention the safety rule during its charge.

Plaintiff now alleges that this Court erred because it did *not* advise the jury to disregard defendant's safety rule. However, plaintiff's counsel did *not* request a cautionary or limiting instruction. *See* Fed. R. Civ. P. 51; *Harkins v. Ford Motor Co.*, 437 F.2d 276, 278 (3d Cir. 1970) (parties may *not* assign as error the failure to give an instruction unless they object to such failure before the jurors retire to consider their verdict). Therefore, as he did with his challenge to the sufficiency of the evidence, plaintiff has waived this argument. In addition, this Court specifically instructed the jury that the negligence of the plaintiff was not a defense. *See* Tr. 8/23/90 at p. 77.

Moreover, any error on this point was at best harmless. The safety rule was *not* mentioned in the
[21] closing arguments or during the charge. The safety rule was *not* included with the exhibits given to the jury during its deliberations. *See Link v. Mercedes-Benz of North America, Inc.*, 618 F. Supp. 679, 691 (E.D. Pa. 1985) (plaintiffs could *not* assign as error the failure to give a cautionary instruction on the hearsay issue before the jury retired in a situation in which plaintiffs did *not* propose cautionary instructions in their proposed points for charge, at the charge conference, or during a sidebar conference following the charge to the jury; moreover, failure to give such an instruction did *not* amount to "plain error" that would warrant a new trial), *aff'd in part and vacated in part on other grounds*, 788 F.2d 918, 926-27 (3d Cir. 1986).

F.

Finally, plaintiff's counsel contends that a new trial should be granted based on the newly discovered evidence that plaintiff's witness Joseph Gartland testified falsely to material facts which effected the outcome of this case.

Plaintiff's counsel, without factual or legal justification, accuses Mr. Gartland of testifying falsely. Consequently, he labels "perjury" what is at most inconsistencies between various witnesses' recollections of what happened or who was present in the time shortly after plaintiff's accident. He claims that Mr. Gartland's testimony that he was at the scene immediately after the accident and that photographs taken at that time accurately reflect the scene as it appeared to him is inaccurate. Plaintiff's counsel claims that he had no
[22] reason to anticipate the substance of Mr. Gartland's testimony. However, the record proves otherwise and shows conclusively that plaintiff is *not* entitled to a new trial.

Whether plaintiff claims a right to relief under Rule 60(b)(2) of the Federal Rules of Civil Procedure for newly discovered evidence or Rule 60(b)(3) for fraud, misrepresentation, or other misconduct, he is *not* entitled to relief on either basis. In *Posttape Associates v. Eastman Kodak Co.*, 68 F.R.D. 323 (E.D. Pa. 1975), *rev'd on other grounds*, 537 F.2d 751 (3d Cir. 1976), the Court stated:

> Relief under Rule 60(b)(2) is extraordinary relief which, in our sound discretion, we may grant only here extraordinary circumstances are present. A party is not entitled to a new trial on the grounds of newly discovered evidence unless "it . . . appear[s] that the evidence is not merely cumulative, that it

> could not have been discovered prior to trial through the exercise of reasonable diligence, and that the evidence is such as would probably change the outcome." Newly discovered evidence is "evidence 'of which the aggrieved party was excusably ignorant' at the time of trial." Relief under Rule 60(b)(3) is also extraordinary relief. The burden of demonstrating its appropriateness lies with the movant who must establish by clear and convincing evidence that the adverse party obtained the verdict through fraud, misrepresentation, or misconduct. We must deny a Rule 60(b)(3) motion if it is merely an attempt to relitigate the case or if we conclude that fraud has not been established.

Id. at 327. *See also Plattner v. Strick Corp.*, 102 F.R.D. 612, 614 (N.D. Ill. 1984).

The requirements are strictly enforced and, where the identity of witnesses is known before the trial,
[23] reasonable diligence requires the party to either depose the witnesses or produce them at trial. *Moore v. Rosecliff Realty Corp.*, 88 F. Supp. 956, 961 (D.N.J. 1950). In *Moore*, the court stated the strong policy reasons for strict application:

> These rules of law must be strictly enforced. If not strictly enforced, it would open the door for litigants to withhold available testimony, and then, if the result of the trial was adverse, resort could be had under the guise of newly discovered testimony to obtain another trial in which the litigants could correct the mistakes made in the former trial and perhaps secure a different result. The aim of the law should be to force litigants to the fullest preparation of their cases before trial. This can best be accomplished by strictly enforcing the principles of law governing new trial.

Id.

The record proves that plaintiff cannot meet any of the requirements to obtain a new trial pursuant to Rule 60 of the Federal Rules of Civil Procedure. First, the photographs in question were produced to plaintiff during discovery on November 11, 1987, more than three and one-half years before the trial. In addition, the witnesses from the railroad whose affidavits are attached to plaintiff's motion, as well as Mr. Achey, the photographer, were identified in answers to interrogatories served on plaintiff on November 24, 1987. Furthermore, the photographs, as well as all of the witnesses, except Mr. Achey, were listed in the Proposed Final Joint Pretrial Order filed on December 11, 1987. At no time prior to trial did plaintiff lodge any objection regarding the authenticity of the photographs.

[24] Second, plaintiff cannot properly claim ignorance or surprise regarding Mr. Gartland's testimony about his presence at the scene immediately after the accident or the position of the cars as reflected in the photographs. Mr. Gartland was listed in the Proposed Final Joint Pretrial Order as a liability witness to the "[p]osition of cars at time of the accident." In addition, on July 19, 1988, more than two years before trial, an affidavit by Mr. Gartland was filed as an exhibit to defendant's response to plaintiff's motion for partial summary judgment which reflects the substance of his trial testimony.

Finally, although plaintiff's counsel claims that it was *not* until subsequent to trial that he learned that the photographs were *not* taken immediately following the accident, the transcript shows that he at least believed that to be the case before the trial. On the first day of trial, defense counsel used photograph D-2 during the cross-examination of plaintiff's first witness, Mr.

Laudenslager. At that early stage, and for the first time in the three and one-half years after the Pretrial Order was filed, plaintiff's counsel objected as follows:

> MR. BARISH: Your Honor, if I may, I object to this photograph, primarily because there is no evidence as to when this was taken. *We have reason to believe that this was something that was taken sometime after the time in question.*

See Tr. 8/21/90 at pp. 71-72 (emphasis added).

Despite counsel's representation to this Court that he had some question regarding the authenticity of the photographs prior to trial, he chose *not* to ask Mr. Laudenslager a single question regarding their
[25] authenticity. Nor did he ask another witness, Mr. Dieter, any such questions. However, defense counsel elicited from both Mr. Laudenslager (*See* Tr. 8/21/90 at p. 71) and Mr. Dieter (*See* Tr. 8/22/90 at pp. 18-19) the fact that their recollections of the position of the cars after the accident were different from the photographs. In fact, their sworn testimony at trial is inconsistent with the affidavits now submitted by plaintiff in support of his motion for a new trial.

Mr. Laudenslager in his post-trial affidavit states specifically that: "No other cars were moved down the line. There were only two cars at the accident." However, when his recollection on that subject was tested during the trial he was *not* so certain:

> Q. And on this photograph [D-2] I believe you'll see that there is a box car and two scrap cars?
>
> * * * *
>
> Q. Mr. Laudenslager, I just want to be sure that you do not recall—
>
> A. No, I don't.

Q. Do you recall that this was not the situation immediately after the accident or do you just not recall one way or the other?

A. I'm not sure. I don't remember that.

See Tr. 8/21/90 at pp. 71-72.

Likewise, Mr. McFetridge in his post-trial affidavits offered in support of plaintiff's motion for a new trial claims that he inspected the car after it had been moved from the scale track. However, Mr. Dieter identified a report, plaintiff's Exhibit P-4, prepared by Mr. [26] McFetridge which disclosed that the car was on the scale track at the time of the inspection. *See* Tr. 8/22/90 at pp. 17-18. Finally, Mr. Laudenslager's affidavit states that he gave Mr. Gartland a statement at the yard office regarding the accident, shortly after it happened (at trial he testified that the statement was given within one-half hour of the accident, Tr. 8/21/90 at p. 76). The photographs show that the yard office is in the vicinity of the accident. Therefore, Mr. Laudenslager's affidavit, as well as those of Bright and Ziegler, confirm Mr. Gartland's testimony that he was at the scene of the accident within a short time after the accident.

Plaintiff's counsel chose not to ask Mr. Gartland a single question regarding the authenticity of the photographs, chose not to object to the introduction of the photographs, chose not to request a continuance, and chose not to introduce any rebuttal witnesses, although both Laudenslager and McFetridge were with plaintiff and his counsel throughout most of the trial.

The record provides no support for the claim of newly discovered evidence. The photographs, the identity of all potential fact witnesses, and the substance of Mr. Gartland's testimony regarding his presence at the scene and the position of the cars immediately after the

accident were all known to plaintiff's counsel long before trial. Reasonable diligence required plaintiff's counsel to either depose witnesses or otherwise investigate the situation. In fact, the discrepancies between the photographs, and testimony regarding them, and other witnesses' recollections of the situation were known to
[27] plaintiff's before trial. Furthermore, these inconsistencies were brought to the attention of the jury not by plaintiff's counsel but by defense counsel during cross-examination of two of plaintiff's witnesses. That the recollection of other witnesses also may have been inconsistent with the photographs or Mr. Gartland's testimony is merely cumulative and, therefore, *not* likely to change the outcome of the trial.

Plaintiff likewise finds no support for a claim of fraud or misrepresentation. Under Rule 60(b)(3), plaintiff must demonstrate the claimed "perjury" by clear and convincing evidence. As outlined above, the affidavits submitted by plaintiff do *not* establish even inaccurate testimony, let alone perjury. They reflect, at best, differences in recollections concerning who was where during the obviously hectic period of time immediately following the accident and the position of the railroad cars during that time.

Moreover, the affidavits themselves are internally inconsistent. Two of them claim that no more than five people were present at the scene of the accident. *See* Affidavits of Thomas Ryan and Richard McFetridge. Nevertheless, there are affidavits from five people, all of whom claim to have been at the scene of the accident, reporting variously that paramedics (*See* Affidavits of Robert A. Laudenslager, Thomas Ryan, John Bright, and Richard McFetridge), and Ed Christine (*See* Affidavit of John Bright), and other people "out of the shanty" (*See* Affidavit of Francis Ziegler) were present

[28] as well. In addition, some are inconsistent with the evidence plaintiff submitted at trial[4] and with plaintiff's position in this current motion.[5] Surely such conclusory and inconsistent affidavits do *not* and cannot sustain plaintiff's heavy burden of proving the claim of perjury by "clear and convincing evidence."

II. CONCLUSION

For the reasons stated above, I denied plaintiff's motion for a new trial by an order dated December 28, 1990.

DANIEL H. HUYETT
Daniel H. Huyett, 3rd, Judge

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[4] Mr. McFetridge's post-trial affidavit regarding the location of the car during his inspection with Mr. Dieter is inconsistent with the report prepared by McFetridge and Dieter and introduced at trial as Plaintiff's Exhibit P-4.

[5] While plaintiff's counsel claims that Mr. Gartland was *not* at the scene of the accident immediately after the accident, the post-trial affidavits submitted in support of plaintiff's motion for a new trial reflect that Mr. Gartland was present taking statements in the yard office, which the photographs show is in the immediate area of the accident.

No. 91-1524

MOTION FILED
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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

FRANK J. ESCHBERGER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

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Pursuant to Rule 37.4 of the Supreme Court Rules, the Association of American Railroads moves for leave to file the attached Brief of *Amicus Curiae* Association of American Railroads in Support of Petitioner. Respondent Frank J. Eschberger has refused consent to the filing of this Brief of *Amicus Curiae*.

As is more fully set forth in the section of the brief entitled Statement of Interest of *Amicus Curiae*, the Association of American Railroads ("AAR") is a voluntary, nonprofit, unincorporated trade organization. Its members constitute the vast majority of the nation's railroads, operating approximately 85 per cent of the line-haul mileage, producing approximately 93 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, with nearly 250,000 employees.

The purposes and concerns of the AAR are railroad operation and equipment. Thus, the interpretation and application of the Safety Appliance Act are matters of importance to the AAR. In the course of the enactment of the Safety Appliance Act, Congress recognized the expertise of the American Railway Association, predecessor of the AAR, in determining what equipment is safe. Indeed, Congress in Section 5 of the Act specifically authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height for drawbars on freight cars throughout the United States, the drawbar being the name of the tongue of the coupler. Act of March 2, 1893, c. 196, §5, 27 Stat. 531 (first sentence omitted as executed) 45 U.S.C. §5. As Senator Cullom, the sponsor of the bill, explained to the United States Senate, the reason for naming the American Railway Association was as follows:

> The American Railway Association is named in the Bill, not especially because it is composed of officers of railroads, but because it is composed of men who make the railroad problem a study and who know just what kind of a car is safe, what kind of an appliance or device ought to be put on, and what ought not to be put on.

24 Cong. Rec. 1276 (1893).

The AAR is concerned with this case, which addresses the question whether uniform, nondefective equipment can create liability under the Safety Appliance Act. The state appellate court incorrectly ruled that nondefective equipment *can* create such liability, holding that a failure of couplers to couple automatically imposes absolute liability, no matter what the reason for the failure to couple. The AAR is also concerned with this case because it exacerbates the conflicting standards for railroad operation and equipment. The state appellate court's imposition of absolute liability directly conflicts with recent holdings of two United States Courts of Appeals. *Reed v. Philadelphia, Bethlehem and New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado v. Missouri P. Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987). Moreover, the state appellate court's holding would impose upon railroads a duty to use coupling equipment which has been recognized as virtually nonexistent by at least one United States Court of Appeals. *See United Transportation Union v. Lewis*, 711 F.2d 233, 235 n.5 (D.C. Cir. 1983). In addition, the state appellate court's holding imposes liability upon the railroads for following a procedure of manually aligning couplers which has been explicitly approved by federal governmental regulations. 49 C.F.R. §218.39.

In light of the AAR's recognized expertise in railroad equipment and operation, and the participation of the AAR's predecessor organization in the enactment of the Safety Appliance Act, the AAR respectfully submits that the attached Brief of *Amicus Curiae* will aid this Court in its interpretation and application of the Safety Appliance Act. The AAR therefore moves this Court for leave to file *instanter* the attached brief.

Respectfully submitted,

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I. STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Association of American Railroads ("AAR") is a voluntary, nonprofit, unincorporated trade organization. Its members constitute the vast majority of the nation's railroads, operating approximately 85 per cent of the line-haul mileage, producing approximately 93 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, with nearly 250,000 employees.

For over a century, one of the principal purposes of the AAR and its predecessor association has been to bring about uniformity in the equipment that is used to transport freight by rail throughout the United States, Mexico, and Canada. Unlike most foreign railroads, American railroads are not government monopolies. Independent companies own their own railroad cars, right-of-way and equipment, but must be able to interchange and move their cars through other companies' lines when they reach the limits of their own territories. Hence, unless the freight they are carrying is to be unloaded and reloaded, the railroad cars themselves must be interchangeable with all connecting lines to carry the freight to destination. To make such interchange possible, American railroads have for many years required railroad cars to be so constructed as to be able to connect with the railroad cars of other companies. The key to this ready interchange is the type of coupling or connecting device that enables one car to be connected to another.

By the late 1800's, many different kinds of so-called "automatic" coupling devices had been installed by the numerous railroads that then constituted the American

system. (S. Rep. No. 1049, 52d Cong., 1st Sess. 6 (1892) [hereinafter Senate Report].) Over 7,000 patents had been issued. (Senate Report p. 6.) No uniformity in coupling devices existed. (Senate Report p. 5.) The result of this was that when railroad cars reached interchange points with the lines of other railroads, the couplers did not work automatically. Instead, individual coupling efforts had to be made, which usually required railroad employees to go between the cars and manually adjust the fit during the actual coupling of the cars, *i.e.*, while one car was moving toward another. This was a dangerous practice and many railroad men were killed or injured. 24 Cong. Rec. 1275 (1893).

In an attempt to reduce the safety hazards of noninterchangeability, the Master Car Builders Association of the United States (a voluntary association of officers from railroad mechanical departments, and a predecessor organization of the AAR) proposed, as early as 1887, the adoption of a uniform coupler for use on all railroads in the United States. (Senate Report pp. 80-81.) In 1892, legislation providing for uniformity was introduced in the Senate and House, which led in 1893 to the enactment of the Safety Appliance Act ("SAA"). (Senate Report p. 1.) The Act sought, *inter alia*, to impose uniform standards for couplers. After much debate over which type of coupler was best and who exactly should choose it, Congress decided to let the railroads themselves choose the best coupler.[1] Thus, the SAA simply prescribed that cars be "equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." 45 U.S.C. §2.

[1] "But when it comes to the coupler provision we simply say that a type of coupler uniform in character shall be adopted and three-fourths of the cars of the country shall settle the question of what type that shall be." 24 Cong. Rec. 1329.

Congress recognized the expertise of the American Railway Association, predecessor of the AAR, in determining what uniform equipment is best. Indeed, Congress in Section 5 of the Act specifically authorized the American Railway Association to designate to the Interstate Commerce Commission the standard height for drawbars on freight cars throughout the United States, the drawbar being the name of the tongue of the coupler. Act of March 2, 1893, c. 196, §5, 27 Stat. 531 (first sentence omitted as executed) 45 U.S.C. §5. As Senator Cullom, the sponsor of the bill, explained to the United States Senate, the reason for naming the American Railway Association was as follows:

> The American Railway Association is named in the Bill, not especially because it is composed of officers of railroads, but because it is composed of men who make the railroad problem a study and who know just what kind of a car is safe, what kind of an appliance or device ought to be put on, and what ought not to be put on.

24 Cong. Rec. 1276 (1893).[2]

As Senator Cullom recognized, the purposes and concerns of the AAR are matters of railroad operation and equipment. The AAR is thus intimately concerned with the state appellate court's decision, which casts into doubt the adequacy of a nondefective coupler, uniform with other couplers, to satisfy the requirements of the SAA. The AAR is also concerned with the conflicting

---

[2] The requirement that the drawbar be of a standard height has been carried on today into the regulations of the Federal Railroad Administration ("FRA"), 49 C.F.R. Ch. II, Part 232.2. Other requirements of the FRA govern the numerous federal safety standards for railroad cars, including couplers, 49 C.F.R. Ch. II, Section 215.121, 123, 125, 127. The FRA is part of the United States Department of Transportation.

legal standards for railroad equipment, exacerbated because the state appellate court's holding is contrary to recent decisions by the United States Courts of Appeals for the Third and the Fifth Circuits, which have held that a nondefective coupler, which fails to couple automatically because the drawbars were not properly aligned, is *not* a basis for liability under the SAA.[3] *Reed v. Philadelphia, Bethlehem and New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991); *Maldonado v. Missouri P. Ry. Co.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987).

Placing absolute liability upon railroads under the SAA, an equipment statute, in a situation where no equipment defect exists, imposes a substantial and improper burden on the railroad industry and interstate commerce. Such a burden is particularly improper where the equipment which would be required by the state appellate court's decision does not even exist, *see United Transportation Union v. Lewis*, 711 F.2d 233, 235 n.5 (D.C. Cir. 1983), and where the procedure which the state appellate court found created liability is *approved* in federal governmental regulations. *See* 49 C.F.R. §218.39.

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[3] Indeed, the court in *Reed v. Philadelphia, Bethlehem & New England R.R. Co.*, 939 F.2d 128 (3d Cir. 1991), specifically noted the conflicts between the United States Courts of Appeals and the state courts on this issue, and the need to have the issue "definitively resolved" by this Court.

II. SUMMARY OF ARGUMENT

The state appellate court held that the failure of railroad cars to couple automatically because the drawbars were misaligned creates absolute liability for the railroad under the Federal Safety Appliance Act, even if the misalignment were *not* the result of any equipment defect. This is a misinterpretation and misapplication of the Safety Appliance Act, which conflicts with the holdings of two United States Courts of Appeals. In addition, the holding that the SAA applies to the adjustment of a drawbar under the circumstances of this case is inconsistent with the approval of this procedure in railroad work, which was considered in 1983 and 1984 as part of the rule-making authority of the Federal Railroad Administration. 49 C.F.R. §§218.39 and 218.41.

III. ARGUMENT

The judgments of the state trial and appellate courts were based upon a finding that the Petitioner, Consolidated Rail Corporation ("Conrail"), violated the Federal Safety Appliance Act when its employee and brakeman, Respondent Frank J. Eschberger, allegedly suffered a back injury while adjusting and centering a drawbar in preparation for coupling. The coupler in the case at bar had no defects. It was uniform with other couplers. The drawbar was not slewed because of any defect in the coupler. The procedure followed by the Respondent for positioning the drawbar was the one specifically mandated by the Federal Railroad Administration, published in the Federal Register, and adopted by the Petitioner railroad as the safe method to follow. (*See* pp. 10-11 *infra.*) The track was pegged and protected from any movement. It was a procedure the Respondent had performed "hundreds and thousands of times" (R. 995.) Coupling occurred automatically upon impact after the drawbar was correctly positioned. (R. 686, 697, 995.)

The state trial court permitted the jury to find a violation of the Safety Appliance Act simply because the drawbar of a coupler had to be manually aligned in order to couple automatically on impact. The state appellate court affirmed the trial court's erroneous ruling, relying upon the fact that "most courts" have imposed liability in similar situations where a railroad worker has suffered injuries while adjusting a misaligned drawbar. However, more recent and well-reasoned federal court decisions interpreting this Court's decision in *Affolder v. N.Y.C. & St. L. R. Co.*, 339 U.S. 95 (1950), have held that liability should *not* be imposed simply because nondefective equipment becomes misaligned and must be manually

adjusted so that automatic coupling occurs. *See Reed v. Philadelphia, Bethlehem & New England R.R. Co., supra,* 939 F.2d at 132; *Maldonado v. Missouri P. Ry. Co., supra,* 798 F.2d at 768.

The lower courts' error was in failing to understand the nature of the Safety Appliance Act, which states in pertinent part that it is unlawful for a railroad to use any car not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars. 45 U.S.C. §2. The legislative history reveals that this provision was designed to address the hazardous situation described as follows:

> A railroad employee . . . is asked to step inside the track, stand up against a car which is not moving, and watch the coming of another car, which is being pushed steadily up against the car near which he stands . . . . I doubt whether there is a Senator here who can stand deliberately and see a long train coupled in the way the coupling is now done without turning his eyes away as two cars come together just before it is the duty of the car-coupler to make the connection and then get out of the way . . . . This bill does not require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893).

Thus, Section 2 of the Safety Appliance Act governs the dangerous *act of actually coupling* the cars, *not* the *preparation* for coupling the cars. Specifically, the statute does not prohibit men from going between the cars when the cars are standing still in order to prepare the knuckles and drawbars for couplings, as was the situation in this case.

> I think very few people have lost their lives by coupling inventions between cars when they are at a standstill, but it is the continuous shifting and moving of cars in which the brakeman is expected to do the work under circumstances of great danger.

24 Cong. Rec. 1367.

This Court has recognized the intent of Section 2 of the SAA, holding that the failure of cars to couple on impact is actionable under the SAA only if "the coupler was placed in a position to operate on impact." *Affolder v. NYC & St. L. R. Co., supra,* 339 U.S. at 99. A failure to couple due to negligence in setting the coupler might create liability under the Federal Employer's Liability Act, but it does *not* create liability under the Safety Appliance Act. *Id.* at 101 (Reed, *J.*, dissenting because this should have been made more clear to the jury). And as Mr. Justice Jackson stated, dissenting for the same reason, the charge given in *Affolder* gave the jury the *erroneous* impression "that it need only find that two cars failed to couple on impact to establish a violation of the Safety Appliance Act. *This,* as the court recognizes, *is not the law.* Before a failure to couple establishes a defective coupler, it must be found that it was properly set so it could couple. If it was not adjusted, as such automatic couplers must be, of course, the failure is not that of the device." *Id.* (Emphasis supplied.)

Several recent federal appellate court decisions have relied upon *Affolder* and the legislative history of the SAA in holding that a failure to couple automatically upon impact due to misaligned drawbars does *not* create absolute liability. *Reed, supra,* 939 F.2d at 132; *Maldonado v. Missouri P. Ry. Co., supra,* 798 F.2d at 768. *Cf. United Transportation Union v. Lewis,* 711 F.2d 233, 235 n.5 (D.C. Cir. 1983). The Third Circuit and the Fifth Circuit have held that the railroad should be

permitted to show that the misalignment of the drawbars, and the consequent failure to couple, was caused by something other than defective equipment. *Reed*, 939 F.2d at 132, *Maldonado*, 798 F.2d at 768. For instance, in *Reed* (as in this case) there was evidence that the drawbars were not defective and that the movement of the car along the track could have jarred a drawbar out of alignment. In such a situation, the Respondent's injury while manually adjusting the drawbar in preparation for coupling was not a basis for absolute liability under the Safety Appliance Act.

The act of going between cars before or after coupling is not forbidden by the Safety Appliance Act. The statute only prescribes that the equipment should be such that the actual coupling and uncoupling can occur without men going between cars. Indeed, the legislative history and the regulations interpreting the Act recognize that men must go between cars after the coupling is made in order to fasten the air hoses together.

> Mr. George: *** Is it not necessary that every time a coupling is made, that is a joining of one car to another on the train, there shall also at the same time be a junction of these pipes [air hoses]?
>
> Mr. Peterson: It may be, if necessary to do it; but that is a thing that cannot be done under any other circumstances, and I think the danger is reduced to a minimum by what is proposed. On the other hand, the coupling of the cars is a thing that is done under peculiar circumstances.
>
> For instance, in a yard where cars are being shunted . . . a brakeman . . . is expected to rush in when the car comes to the point of impact and be ready to guide the link and drop the bolt.

24 Cong. Rec. 1367. Thus, the legislative history clearly distinguishes between the dangerous act of coupling while cars are moving and the relatively harmless acts of adjusting air hoses (or adjusting drawbars) while the cars are still.

The Federal Railroad Administration has recognized that it is necessary to go between cars before and after coupling in order to connect air hoses and adjust drawbars, and has issued minimum requirements to be incorporated by all railroads as part of their operating rules. *See* 49 C.F.R. §218.39. This regulation is the result of a joint proposal of the AAR and the United Transportation Union,[4] and controls the very action that took place in this case—adjusting the drawbar portion of the coupling device so a coupling can be made after cars are "humped" into a "bowl." That the adjustment of drawbars is necessary to daily railroad operations, and was to be covered by the regulation, was made clear in the analysis contained in the notice of proposed rule making. *See* 48 Fed. Reg. 45272-73 (Oct. 4, 1983). The final rule was published on February 22, 1984 to become effective on March 23, 1984. 49 Fed. Reg. 6495-6497 (Feb. 22, 1984). The regulation itself recognizes that the action of adjustment of the couplers is required in day to day operations, and specifies what steps shall be taken to protect the person making such adjustments, thus covering the precise situation involved in this case.[5] The regulation provides:

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[4] The United Transportation Union is the nationwide union whose members, on the railroads which are members of the AAR, perform the work of adjusting drawbars.

[5] The fact that the regulation went into effect after Respondent's injury in no way detracts from this argument that the regulation is federal governmental recognition of the necessity that has *always* existed for drawbars to be manually adjusted so that automatic coupling can occur.

> (a) *When a train or engine service employee is required* to couple an air hose or *to adjust a coupling device* and that activity will require that the employee place himself between pieces of rolling equipment located *on a bowl track*, the operator of any remotely controlled switch that provides access from the apex of the hump to the track on which the rolling equipment is located, shall be notified . . .

49 C.F.R. §218.39. (Emphasis supplied.) The rule goes on to specify how the tracks shall then be blocked until the protection is no longer required for the employee.

In accordance with this federal requirement, Rule 1711 of Consolidated Rail Corporation's Safety Rules (R. 2813, Petitioner's Ex. B), which was in effect at the time of Respondent's injury, provides for protection against any approaching equipment when an employee goes between equipment for the purpose of adjustment:

> 1711. Before Fouling, going between or under standing equipment for inspection, *adjustment*, repairs or other purposes:
>
> (a) Arrangements for protection must be originated and terminated only by the employee who follows, goes between or under the equipment
>
> . . .
>
> (f) Equipment must be separated by a distance of at least 30 feet before any *drawbar*, knuckle, hose, or other *between equipment adjustment is made.*

(Emphasis supplied).

The record shows that Respondent came upon the lumber car on Track 61, and observed that its drawbar was slewed and that it was necessary to align the drawbar to place it in a position where coupling could, and did, occur automatically upon impact. The necessity of such a preparatory act in order to permit the couplers to couple automatically is not a violation of the SAA. *See Affolder v. N.Y.C. & St. L. R. Co., supra*, 339 U.S. at 99.

IV. CONCLUSION

Although the Safety Appliance Act is an equipment statute, the state appellate court held that the Safety Appliance Act issue could be submitted to the jury where there was no evidence of defective equipment. Thus, the court permitted the jury to find the railroad liable for the act of its employee in performing a routine adjustment of a drawbar that was not out of line because of any equipment defect. Imposing absolute liability in this situation is contrary to two recent decisions of United States Courts of Appeals.

The FRA has recognized, as did Respondent, that drawbar adjustment takes place thousands of times a day in railroad yards all over the country in order for automatic coupling upon impact to occur. As demonstrated herein, to hold Conrail liable for this act of adjusting a nondefective drawbar is contrary to the language and purpose of the Safety Appliance Act. Indeed, holding railroads liable for this routine act hampers the ability of railroad yards throughout the United States to function. The AAR therefore respectfully requests this Court to grant Petitioner's Petition for a Writ of Certiorari and to reverse the judgments below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1991

CONSOLIDATED RAIL CORPORATION,

Petitioner,

vs.

FRANK J. ESCHBERGER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, FOURTH JUDICIAL DEPARTMENT

OBJECTION TO MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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OBJECTION TO MOTION OF ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

The motion to file a brief as *amicus curiae* of Association of American Railroads (hereinafter AAR) should be denied because its proposed brief brings no relevant matters to the Court's attention that is not already covered in the petition for certiorari that was already submitted to this Court. In fact, the motion does

not even make an attempt to identify matters which are not adequately covered in the petition for certiorari. Apparently, this Court is expected to overlook the presumption of disfavor of such motion stated in Rule 34.2 of this Court's rules solely on the basis of self-serving assertion of its own "expertise in railroad equipment and operation", and the activities of its predecessor nearly a hundred years ago.

The instant motion should be especially disfavored because the motion papers and attached brief are replete with misstatements of the duty imposed upon railroads by Federal Safety Appliance Act (hereinafter FSAA) §2, and this Court's holdings concerning it. Contrary to assertions made in the proposed brief, this Court, in *Affolder v. New York C. & St. L. R. Co.*, 339 U.S. 95 (1950) specifically held that liability under FSAA §2 is *not* dependent upon proof that a coupler is defective. *Affolder, supra*, 339 U.S. at 99.

The same misconstructions of the case of *United Transportation Union v. Lewis*, 711 F2d 233 (D C Cir 1983) that are made in this petition are repeated in the proposed brief. With regard to the claims that the Federal Railroad Administration favors the existence of a misaligned drawbar defense, it should be noted that the brief submitted by it in the *Lewis* case reached the opposite conclusion. *Lewis, supra*, 711 F2d at 251, footnote 39. The statements made in Footnote 5 of the *Lewis* case concerning automatic realigning devices were made nine years ago, in 1983, and were in turn based upon statements in another case decided nine years prior to the *Lewis* decision, in 1974. Thus, nothing said in the *Lewis* case provides any indication of what percentage of railroad cars are *presently* equipped with automatic realigning devices.

In sum, the motion to file an *amicus curiae* brief should be denied because the proposed brief merely repeats arguments already made to this Court in the petition. Therefore, the proposed brief is at best redundant and at worse a hindrance and an unnecessary burden to this Court. The motion for leave of AAR to submit an *amicus curiae* brief should be denied.

CONCLUSION

The motion of Association of American Railroads for leave to file an *amicus curiae* brief should be denied.

Respectfully submitted,

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION

Respondent does not dispute that there is a conflict between the state court decision below and the decisions of federal courts of appeals in *Maldonado*[1] and *Reed*[2] concerning the proper interpretation of the federal Safety Appliance Act, 45 U.S.C. §2, and that the lower courts

[1] *Maldonado v. Missouri Pac. Ry.*, 798 F.2d 764 (5th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987).

[2] *Reed v. Philadelphia & N. Eng. R.R.*, 934 F.2d 128 (3d Cir. 1991).

have called upon this Court to resolve that conflict (Opp. at 11, 12; Pet. at 21).[3] Indeed, respondent concedes that there is a need to reconcile the subsequent judicial decisions with the D.C. Circuit's decision in *Lewis*,[4] deferring to and upholding the responsible federal agency's interpretation of the Act (Opp. at 12).

Respondent also does not dispute that the question presented is important. Thus, respondent does not dispute that the question concerns possible liability for a situation arising numerous times every day on all of the Nation's freight railroads which, like Conrail, have switching yards in several states and federal circuits. Nor does respondent dispute that the conflicting decisions and resulting uncertainty about the proper interpretation will result in imposing substantial liabilities on the already financially strapped railroads[5] or may cause them to undertake costly retrofitting of existing rail cars (Opp. at 14), neither of which Congress intended.

---

[3]Respondent notes that the Court has denied certiorari in four prior cases where the lower court decision addressed the "misaligned drawbar" defense (Opp. at 13), but three of these petitions were filed before the present conflict had developed, and the fourth (*Maldonado*) was the first decision to sustain that defense. After further percolation of the issue in the federal and state courts, it is now clear that the Fifth Circuit's decision in *Maldonado* was not "aberration[al]" (Opp. at 12), having been followed by the Third Circuit's considered decision in *Reed*, but that the state courts are continuing to take a conflicting position, as here. Respondent's reliance on a footnote in *Lewis* is misplaced (Opp. at 12-13), for there the Court of Appeals was merely describing the case law to date, prior to the contrary decisions in *Maldonado* and *Reed*.

[4] *United Transp. Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983).

[5] See *Railroad Revenue Adequacy—1990 Determination*, 8 I.C.C.2d 1 (1991) (only one major railroad is earning adequate net revenue).

Beyond arguing that the decision below was correct,[6] respondent's only ground for opposing certiorari is the contention that "any pronouncement this Court might make" would necessarily have no effect on the outcome and hence would be an "advisory opinion" (Opp. at 4, 6-7). Respondent is mistaken.

Respondent's contention is based on the premise that this Court may not review the dicta of the courts below that Conrail had failed to elicit evidence that the drawbar was misaligned before the attempted coupling or that any such misalignment was not caused by an equipment defect (*id.* at 7). However, there was indisputably sufficient evidence on both points (*See* Pet. at 16 n.16),[7] and the proper question for this Court is

[6] As to its correctness on the merits, respondent does not dispute that, under the decision below, liability is established any time a worker must penetrate the airspace behind one car, no matter how far up the track there is a second car, and even if that second car's proximity has nothing whatever to do with the worker's injury. Respondent has not shown how such an attenuated, theoretical basis for liability can be read into a statute intended to prevent railroad workers from being crushed between two adjacent moving cars (*see* Pet. 11-12; Amicus Br. 7-10).

[7] Although, as is often the case, no one saw the drawbars before the attempted coupling, respondent testified that, after the attempt, at least one of the coupler's knuckles was open and ready for coupling (R. 685-86; A3-A4). Moreover, respondent's witnesses, including his "railroad expert" and a Conrail Trainmaster, testified that the attempted coupling had occurred on a curve that had tended to result in misaligned drawbars (R. 371, 380, 415, 1585; A1-A2; *see also* R. 2152; A3).

Similarly, respondent testified that he was capable of determining whether a drawbar was defective and that he found no defect in the car (R. 1053-54; A6-A7). He also testified that he neither felt nor saw any "burr" or "spurs" on the couplers in question (R. 1065; A. A7), and that he did not make any report of a defective car as a whole or any part thereof, as he was required to do if he thought the drawbar was defective (R. 1053-54; A6-A7). Indeed, respondent continued his normal work, including coupling cars, after he aligned the drawbar (R. 738-39, 1065-1066; A4, A7-A8).

(Footnote continued on following page.)

what kind of showing must be made to trigger the misaligned drawbar defense. That is a question of federal law fairly encompassed by the principal question presented, which this Court could address itself or could direct the state court to consider on remand, once the existence and nature of the defense are confirmed. *See e.g., Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927) (this Court may review state court findings where a Federal right has been denied as a result of an unsupported finding "or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts").

In short, the petition does not ask this Court "to review evidence and discuss specific facts" under an established federal legal standard applied by a federal court, as in *United States v. Johnston*, 268 U.S. 220, 227 (1925), on which respondent relies (Opp. at 4). Rather, the petition calls upon the Court to determine whether the state court applied the correct federal law standard.

(Footnote continued from preceding page.)

The fact that the drawbar was jammed to one side after the attempted coupling (Opp. at 6) does not mean that it was jammed before, rather than as a result of, that attempt. That the coupling was not defective was further evidenced by the fact that, once respondent aligned the drawbar, the cars coupled automatically (R. 994-95; A5). Further, he was able to align the drawbar and effect the coupling entirely on his own without the help that was available to him if it had been needed (R. 1050; A5-A6).

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX TO PETITIONER'S REPLY BRIEF

[R. 371] [201] TESTIMONY OF JOHN WOOD

* * *

Q. All right. And Mr. Wood, would you tell the jury what effect these curves were having on the couplers—on these couplers of these cars that were supposed to be automatic couplers? What effect was those curves having?

A. Well, if a car was to, what we refer to as hangup on the curve, that is after it came off the hump, and prior to getting on the straight piece of track in the classification track, the drawheads and the couplers on a railroad car are lined up, are built into the end of the car center with—with that car on both ends. A car coming down around a curve and stopping on that curve, some of these cars are—are rather long in length, some are up to ninety feet in length, if that car stops on a curve, the—the drawhead that's sticking out from the end of the car will be—will tend to be handing more towards the outside part of that curve. . . .

* * *

[R. 380] [210] * * *

BY MR. BELTZ:

Q. Mr. Wood, this problem with regard—with regard to the—the couplers not coupling, especially involving cars that—well, strike that. The problem that you—that the railroad had there with—with cars not coupling on the curves, that had been going on for a number of years, is that not true?

A. That's true.

* * *

[R. 415] [245] * * *

Q. And they knew that when—they knew when these—when these cars were coming around the curves, that a lot of these cars, the curve was affecting the—the—whether the couplers were directly in line, or whether they were askewed, is that not true, or slewed, if you want to use that word?

A. If a car was coming around a curve, that's correct.

* * *

[R. 1585] [1396] **TESTIMONY OF MICHAEL HERR**

Q. But if I—I understand. So there is curvature from the point—between the point of the hump and the west end of track sixty-one, is that right?

A. Yeah, but the curve is—the curve is on the east end of track sixty-one.

Q. Yes.

A. And then sixty-one straightens out and it goes straight to the west end.

Q. Right. Okay. And Mr. Herr, in this area of the curvature, can you tell us what, if any, effect that was having upon the drawbars on various vehicles—various cars going in that area?

* * *

THE WITNESS: If a car stops on this curve, the drawbar would be off-center from the—because of the curve, and a following car coming down would not couple to this standing car, it would bypass the coupler and would cause the couplers to be knocked off-center or—or slewed. There'a s slang word to it, slewed, would knock them off-center.

* * *

[R. 2152] [1955] TESTIMONY OF GERALD GATES

Q. Now, on a car that has as its destination to go down into track sixty-one, would you illustrate the configuration of the track that—how it would proceed? In a general—from the—once it goes by the retarders, then down into the track.

A. As the car comes over the master, it will hit the first set of divide switches, which separate the classification yard into three major groups, you've got group six and seven, three, four, and five, and one and two, that the car would be routed this route. It would continue down this route, which would lead into group seven, through a series of switches up into track sixty-one.

Q. And would it—and then—would it go around a curve as it would enter into track sixty-one?

A. Yes. It would continue around the curve here on track sixty-one, and back into the tangent part of the yard.

* * *

[R. 685] [509] TESTIMONY OF FRANK ESCHBERGER

* * *

Q. And then if the drawbar—if the drawbar is centered, and you have the—the opposite drawhead working with it in proper alignment, what is the effect of that?

A. Well, it's a coupling effect. It would be just like this, two knuckles—I did open the other knuckle for—simply because when you use two open knuckles, it's easier and more sure of making a coupling, so as I said, I had that open, now I centered this, and I brought the engine—well, at that time I didn't because of this car

[R. 686] [510] rolling free, I knew there was a problem on the other end, but I don't want to get ahead of myself. When I finally did bring the engine ahead, he shoved the cars that we had ahold of, being this side, he shoved them. When the drawheads come together, the knuckles closed, and of course, the pins dropped and the coupling was made.

Q. So it coupled automatically, is that right?

A. Yes.

Q. All right. And was the purpose of you going in to move this, the slewed drawhead, is to center it so that those—so the couplers could couple automatically?

A. Yes.

* * *

[R. 738] [562] * * *

Q. Now Mr.—Mr. Eschberger, after you've completed the coupling on the—on the east—on the east end of the lumber car, would you tell us what you did after that, sir?

A. Well, I went up the rest of the track to make sure it was all coupled. Sometimes you don't go to the complete extreme of the track, you can look up and see if the cars are moving, coming along, and know that the track is coupled.

[R. 739] [563] Q. Okay. And then, Mr. Eschberger, what did you do then, sir?

A. I believe then I—that's a long time ago, but the best of my recollection, I coupled the rest of sixty-two.

Q. And you recall what was involved there?

A. Well, the—the same thing, coupling track, and—

Q. But what I'm trying to find out, Mr. Eschberger, was there—did you—do you know whether you had to couple any cars, actually couple any cars, rather than just go along and see whether they were coupled?

A. On sixty-two?

Q. Right.

A. Yes, I believe I made a few couplings. I don't know, maybe three. I don't know for sure.

* * *

[R. 994] [815] * * *

CROSS EXAMINATION
BY MR. GRIFFIN:

Q. Mr. Eschberger, on the morning of the claimed accident, at the time that you were working, you—you say you moved and centered, aligned a drawbar on each end of this lumber car, is that correct?

A. Correct.

Q. And then when you got it in the center, then you coupled—then you coupled onto that lumber car, is that correct?

A. Correct.

[R. 995] [816] Q. And that coupling worked automatically after you had aligned and centered the drawbar, correct?

A. Yes, it did.

Q. All right. And when you said that it was a—and as you were centering this—centering or aligning the drawbar is something that you've done hundreds and thousands of times in your thirty years of railroading, correct?

A. Yes.

* * *

[R. 1050] [869] * * *

Q. All right. So if you needed any help, for example, from a car repairmen to come over to help you, or you and the conductor, center a drawhead, they would be available over in the car shop, is that correct?

A. Yes.

Q. All right.

A. Well, other places, too. Not just in the car shop.

Q. I understand that. I understand. So—okay. And you did not call for help from the conductor, or help from the—from the car department at all on August 6th, 1983 in connection with any drawhead, right?

A. No, I didn't.

Q. And that's because you didn't need any such help, correct?

A. No, I didn't.

Q. You didn't need help, okay?

A. No.

Q. If you had needed it, it was available, correct?

A. And I would have called for it.

* * *

[R. 1053] [872] * * *

Q. There are various parts of a railroad car that are referred to as safety appliances, is that correct, Mr. Eschberger?

A. Yes.

Q. In your experience? For example, the —the ladders and handholds on a car is referred to as a safety appliance, correct?

A. Yes.

Q. And the handbrake is referred to as a safety appliance isn't it?

A. Yes.

Q. And the coupling device, the drawbar, the knuckle and so on, is referred to as a safety appliance, correct?

A. Yes.

* * *

[R. 1054] [873] MR. GRIFFIN: Let me approach it this way, Mr. Eschberger, did you report any mechanical defect on this lumber car that you have described on August 6th, 1983?

* * *

THE WITNESS: Did I report any defect?
MR. GRIFFIN: Yes.
THE WITNESS: No.
MR. GRIFFIN: And is that because you found no mechanical defect in the car, correct?
THE WITNESS: Correct.

* * *

[R. 1065] [884] * * *

Q. Now, you didn't feel in and feel any—any burr, did you, on any part of the railroad cars?

A. No.

Q. And you didn't see any such burr at any time, did you?

A. No.

Q. You were the only person who was present down there at track sixty-one when you say you felt a muscle pull, is that correct?

A. That's correct.

Q. And you didn't call at that time to your conductor and say, I had a hard one, or I pulled a muscle, or anything like that, correct?

A. No.

Q. Is it—it is true, isn't it, that the first time that you noticed any numbness, or experienced any numbness in your right hand was when you were back at the "Y" later on, after you had completed your work on track sixty-one, is that correct?

A. That's correct.

Q. All right. And prior to that time, you had worked with various cars on track sixty-one and on track sixty-two, is that correct?

[R. 1066] [885] A. Yes, that's correct.

Q. And you don't know how many different drawbars you moved during the course of that work on sixty-one and sixty-two, do you?

A. No. I can't remember.

* * *